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S. Hills.

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

English Courts of Common Law.

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

HERETOFORE CONDENSED BY

THOMAS SERGEANT AND JOHN C. LOWBER, ESQRS.,

Now Reprinted in Full.

VOL LXV.

CONTAINING CASES DECIDED IN THE COURT OF COMMON PLEAS, IN TRINITY
VACATION, AND MICHAELMAS TERM AND VACATION, 1849.

PHILADELPHIA:

T. & J. W. JOHNSON, LAW BOOKSELLERS,

NO. 197 CHESTNUT STREET.

1851.

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COMMON BENCH REPORTS.

CASES ARGUED AND DETERMINED

IN

THE COURT OF COMMON PLEAS,

IN

TRINITY VACATION, AND MICHAELMAS TERM AND VACATION, 1849.

WITH TABLES OF THE NAMES OF CASES ARGUED AND CITED,
AND OF THE PRINCIPAL MATTERS.

BY

JAMES MANNING,

SERJEANT AT LAW;

T. C. GRANGER,

OF THE INNER TEMPLE, ESQ.,

BARRISTER AT LAW;

AND JOHN SCOTT,

OF THE INNER TEMPLE, ESQ., BARRISTER AT LAW.

VOL. VIII.

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1851.



J U D G E S
OF
THE COURT OF COMMON PLEAS,
DURING THE PERIOD COMPRISED IN THIS VOLUME.

The Right Hon. Sir THOMAS WILDE, Knt., Ld. Ch. J.

The Hon. Sir THOMAS COLTMAN, Knt.

The Hon. Sir WILLIAM HENRY MAULE, Knt.

The Hon. Sir CRESSWELL CRESSWELL, Knt.

The Hon. Sir EDWARD VAUGHAN WILLIAMS, Knt.

The Hon. Sir THOMAS NOON TALFOURD, Knt.

Sir JOHN JERVIS, Knt., Attorney-General.

Sir JOHN ROMILLY, Knt., Solicitor-General.

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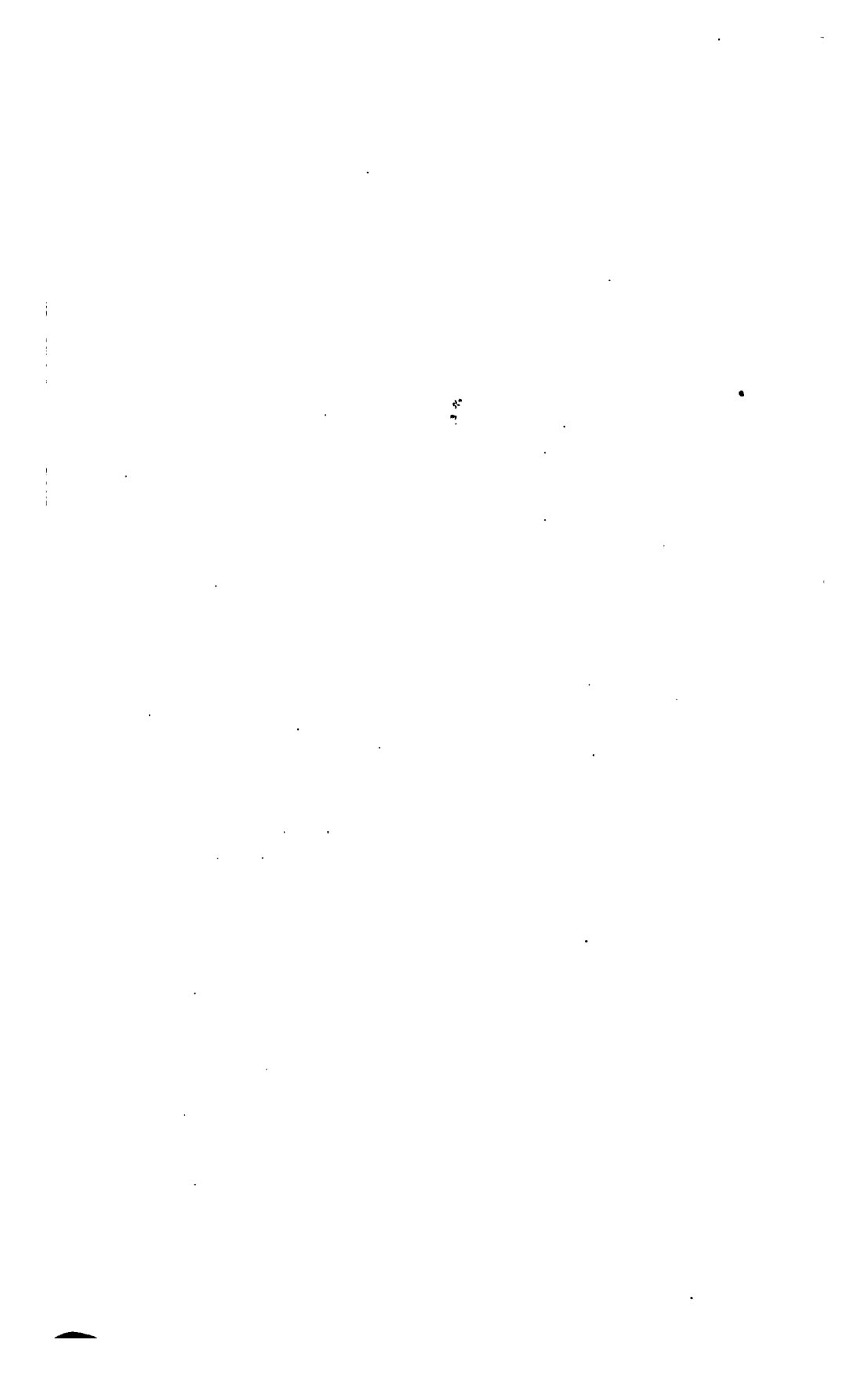
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CASES

UPON APPEAL FROM THE DECISIONS OF REVISING BARRISTERS,

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN

Michaelmas Term,

IN THE

THIRTEENTH AND FOURTEENTH YEARS OF THE REIGN OF VICTORIA.

Michaelmas Term, 1849.

County of WARWICK—Northern Division.

DAVID CAPELL, Appellant, The Overseers of ASTON,
Respondents. *Nov. 12.*

A. owned and occupied freehold land in the parish of B., of more than the clear yearly value of 40s., and also occupied, as tenant, a house of more than the clear yearly value of 19s., in the parish of C., at a distance from the land,—both house and land being within the borough of D.:—Held, that A. was entitled to be registered for the county, in respect of the land, and also for the borough, in respect of the house; for, that, in order to give effect to all the words of the 24th section of the 2 W. 4, c. 45, as expounded by the 27th section, it was necessary to read it as applicable to the tenant or owner distributively, and to construe the words “occupied by him therewith as owner,” as importing an ownership as well of the house as of the land to be united with it—in harmony with the provision by which tenanted land, to be united with a tenanted house, must be occupied under the same landlord. [See the next case.]

DAVID CAPELL claimed to have his name inserted in the list of county voters, for the parish of Aston, in the town of Birmingham, as follows:

Christian Name and Surname of each Voter, at full length.	Place of Abode.	Nature of Qualification.	Street, &c., where Property situate, &c.
Capell, David.	46, Pershore Street, Birmingham.	Freehold building land.	Weston Street, near Bloomsbury Street, Duddleston Manor, in the Liberty of the Nechells.

It was proved that David Capell owned and occupied freehold land in the parish of Aston, of more than the clear yearly value of 40s., and also occupied, as tenant, a house, of more than the clear yearly value of 10*l.*, in the parish of Birmingham, at a distance from the land: both the house and the land were within the limits of the borough of Birmingham.

It was objected, that, under the statute 2 W. 4, c. 45, ss. 24, 27, David Capell was not entitled to vote for the county, in respect of his land, as the house and the land were to be taken together as forming a borough qualification.

The revising barrister held the objection good, and disallowed the claim.

The cases of twelve other persons whose claims to vote rested on grounds precisely similar to the above, were consolidated with the principal case.

Keane, for the appellant. The question in this case turns upon the 24th section of the reform act, 2 W. 4, c. 45, which enacts, "that, notwithstanding anything thereinbefore contained, no person shall be entitled *8] to *vote in the election of a knight or knights of the shire to serve in any future parliament in respect of his estate or interest as a freeholder in any house, warehouse, counting-house, shop, or other building occupied by himself, or in any land occupied by himself together with any house, warehouse, counting-house, shop, or other building, such house, warehouse, counting-house, shop, or other building being, either separately, or jointly with the land so occupied therewith, of such value as would, according to the provisions thereafter contained, confer on him the right of voting for any city or borough, whether he shall or shall not have actually acquired the right to vote for such city or borough in respect thereof." The facts stated by the revising barrister do not bring the case within that provision: the land is at a distance from the house, and in a different parish, and cannot in any sense be said to be "occupied therewith." [WILDE, C. J. You would contend that a house on one side of a highway, and a garden on the other side, could not be occupied together?] A public road could be no obstacle to a joint holding: but, could the Duke of Devonshire be said, in the sense here meant, to occupy his mansion in Piccadilly "together with" Chatsworth? or the Duke of

Northumberland to occupy Sion House "together with" Northumberland House?

The 27th enacts, "that, in every city or borough which shall return a member or members to serve in any future parliament, every male person of full age, and not subject to any legal incapacity, who shall occupy within such city or borough, or within any place sharing in the election for such city or borough, *as owner or tenant*, any house, warehouse, counting-house, shop, or other building, being, either separately, or jointly with any land within such city, borough, or place, occupied therewith by him as owner, or occupied therewith by him as tenant under the same landlord, of the clear *yearly value of not less than 10*l.*, shall, if [*4 duly registered according to the provisions hereinafter contained, be entitled to vote in the election of a member or members to serve in any future parliament for such city or borough." To bring the case within that section, the party must be the occupier of both house and land, as owner, or he must be the occupier of both as tenant under the same landlord. If he be the owner of the one and tenant of the other, neither the words nor the spirit of the act are satisfied. [MAULE, J. That argument rather founds itself upon inference than upon the very words of the statute.] This is the view which seems to have been taken by ERLE, J., in *Dewhurst*, app., *Fielden*, resp., 7 M. & G. 182, 8 Scott, N. R. 1013, 1 Lutw. Reg. Cas. 274, where that learned judge says (8 Scott, N. R. 1013): "The 27th section requires that *one* building of a certain value shall be occupied, in order to obtain the franchise, or land may be joined to the building: but, if the land is occupied by the party as tenant, it must be held under the same landlord." A singleness of possession and title, seems always to have been required. The principle is recognised in *Powell*, app., *Price*, resp., 4 Man. Gr. & S. 105, 1 Lutw. Reg. Cas. 586. There, A. occupied a shop, which, together with a house and other premises, also occupied by him, constituted a sufficient qualification in point of value, neither being sufficient alone. The shop was separated from the rest of the premises by a yard, in the exclusive occupation of A., but there was no complete curtilage or fence surrounding the whole, the yard being approached by a passage at the side of the shop, open to the street, which was also the property of A., but used by the tenant of the adjoining house in common with him: it was held, that the shop could not be joined with the *rest of the premises, so as to constitute [*5 one entire qualification under s. 27.

Mellor, for the respondent. The object of the 24th section was, to prevent persons having borough qualifications, from voting for the county in respect of the same qualification; taking away, in such cases, the right to vote acquired under the 8 H. 6, c. 7. This is plain, from the 25th section, which enacts, "that, notwithstanding anything hereinbefore contained, no person shall be entitled to vote in the election of a knight or knights of the shire to serve in any future parliament, in respect of his

estate or interest as a copyholder or customary tenant, or tenant in ancient demesne, holding by copy of court-roll, or as such lessee or assignee, or as such tenant and occupier as aforesaid, in any house, warehouse, counting-house, shop, or other building, or in any land occupied together with a house, warehouse, counting-house, shop, or other building, such house, warehouse, counting-house, shop, or other building being, either separately, or jointly with the land so occupied therewith, of such value as would, according to the provisions hereinafter contained, confer on him or on any other person the right of voting for any city or borough, whether he or any other person shall or shall not have actually acquired the right to vote for such city or borough in respect thereof." This clause disfranchises copyholders in boroughs, not confining it to the case of owner and occupier being one and the same person. Reading the 24th section with the 27th, which is incorporated in it by reference, it is obvious that the word "therewith" means, with reference, not to *space*, but to *time*. [V. WILLIAMS, J. The word "therewith" is not used in the corresponding clause (s. 11) of the Scotch reform act, 2 & 3 W. 4, c. 65.] The only condition is, that the land and the house shall be locally *6] *situate within the same borough*. The *dictum* of TINDAL, C. J., in Dewhurst, app., Fielden, resp.,—that the amount of qualification may be made up by the conjunction of land occupied with a house, &c., only where the value of the house alone would not suffice to give a qualification,—is extra judicial and uncalled for. The value is wholly immaterial, if the land be occupied together with the house. A person who is *tenant* of a house and *owner* of land, is clearly within this section. The test is, that the voter shall be a person of such credit as to be able to occupy a 10*l.* house. The object of the legislature will be as well secured by the voter's being *tenant* of a house, and *owner* of land, being together occupied by him, and of the required value. The *dictum* of ERLE, J., in Dewhurst, app., Fielden, resp., was wide of the question in judgment. But for the restriction imposed by this section, the qualification might have been made up of two plots of ground held under different landlords. A qualification cannot be gained by the addition of any land that is held under a different landlord: but there is no difficulty in the owner of a house joining two or more pieces of land, provided he holds them as tenant under the same landlord.

Keane, in reply. The real question here is, whether a man shall be allowed to vote for the county, and also for the borough, in respect of the same qualification. The reading of the 24th section, by the respondent, altogether overlooks the words "together with" and "therewith:" and the same difficulty arises upon the 27th section.

WILDE, C. J. We will hear the argument on the next case, before we pronounce any opinion.

***BURTON, Appellant; The Overseers of ASTON, Respondents. [*7
Nov. 12.**

A. *owned* and occupied freehold land in the parish of B. of more than the clear yearly value of 40s., and also occupied, *as tenant*, a house of *less* than the clear yearly value of 10l., in the parish of C., at a distance from the land,—both house and land being within the borough of D., and, if added together, being of value sufficient to form a borough qualification:—Held, that A. was entitled to be registered for the county, in respect of the land, but not for the borough.

JOHN BURTON claimed to have his name inserted in the list of county voters for the parish of Aston, in the town of Birmingham, as follows:—

Christian Name and Surname of each Voter, at full length.	Place of Abode.	Nature of Qualification.	Street, &c., where Property situate, &c.
Burton, John.	34 Court Lower, Brearly Street, Birmingham.	Freehold building land.	Bloomsbury Street, in the Liberty of Nechells, in the Parish of Aston, in the Borough of Birmingham.

It was proved that John Burton *owned* and occupied freehold land, in the parish of Aston, of *more* than the clear yearly value of 40s., and also occupied, *as tenant*, a house, of *less* than the clear yearly value of 10l., in the parish of Birmingham, at a distance from the land. Both the house and the land were within the limits of the borough of Birmingham, and, taken together, were of sufficient value to form a borough qualification.

It was objected, that, under the statute 2 W. 4, c. 45, ss. 24, 27, John Burton was not entitled to vote for the county in respect of his land, as the house and land were to be taken together, as forming a borough qualification.

The revising barrister held the objection good, and disallowed the claim.

The case of Thomas Whitmore, whose claim to vote rested on grounds precisely similar to the above, was consolidated with the principal case.

*Keane, for the appellant. The only distinction between the [*8 former case and this, is, that here the house is of *less* than the clear yearly value of 10l. In addition to what has been already urged, it will only be necessary to invite attention to two other sections of the 2 W. 4, c. 45, viz. the 30th and the 68th. The 30th section enacts, "that, in every city or borough which shall return a member or members to serve in any future parliament, and in every place sharing in the election for such city or borough, it shall be lawful for any person occupying any house, warehouse, counting-house, shop, or other building, either separately, or jointly with any land occupied therewith by him as owner, or *occupied therewith by him as tenant under the same landlord*, in any parish or

township in which there shall be a rate for the relief of the poor, to claim to be rated to the relief of the poor in respect of such premises, whether the landlord shall or shall not be liable to be rated to the relief of the poor in respect thereof; and, upon such occupier so claiming, and actually paying or tendering the full amount of the rate or rates, if any, then due in respect of such premises, the overseers of the parish or township in which such premises are situate, are hereby required to put the name of such occupier upon the rate for the time being; and, in case such overseer shall neglect or refuse so to do, such occupier shall nevertheless, for the purposes of this act, be deemed to have been rated to the relief of the poor, in respect of such premises, from the period at which the rate shall have been made in respect of which he shall have so claimed to be rated as aforesaid." No provision is here made for the contingency of the two properties being situate in different parishes. The words are in the singular number throughout,—a circumstance that is much relied *9] on by TINDAL, C. J., in Dewhurst, app., Fielden, resp. [V. *WILLIAMS, J. Suppose,—which is not infrequent,—the house is partly in one parish and partly in another?] In that case, the rating would be in one parish only. [MAULE, J. The natural meaning of the 30th section certainly seems to be, that the party must occupy both house and land as owner, or as tenant under the same landlord.] That view is very much confirmed by the 68th section, which provides for the erection of polling booths, and enacts, that the returning officer "shall cause to be affixed on the most conspicuous part of each of the said booths the names of the several parishes, districts, and parts, for which such booth is respectively allotted; and that no person shall be admitted to vote at any such election, except at the booth allotted for the parish, district, or part wherein the property may be situate in respect of which he claims to vote, or, in case he does not claim to vote in respect of property, then wherein his place of abode, as described in the register, may be." If the voter's qualification consists of property in one parish, and a tenancy in another, there would be a difficulty in ascertaining where his vote is to be polled.

Mellor for the respondents. There is nothing in the last objection: the party does not vote in respect of the *land*, which is the accessory only, but for the house, which is the principal qualification: he votes in the parish where the house is situate. [WILDE, C. J. How, in the case put, of a house situate partly in one parish and partly in another?] In that case, he may vote in either parish. The 30th section does not very much aid the construction of the 24th and 27th sections. [MAULE, J. The words "under the same landlord" seem to be an exposition of the words "occupied therewith." In your way of reading the clause, the word *10] "therewith" may be rejected altogether.] The word is satisfied by *saying that the premises must have been occupied together

during the period required by s. 27, to confer a right to be on the register.

Keane, was heard in reply.

Cur adv. vult.

Nov. 30. WILDE, C. J., now delivered the opinion of the court. These were appeals from the decision of the revising barrister for the northern division of the county of Warwick, whereby he disallowed the claims of the appellants to be placed on the register as voters for the county, in respect of freehold land occupied by themselves within the borough of Birmingham, of more than the yearly value of 40s. In each case, the appellant occupied a house, as tenant, within the borough, and also occupied his own freehold land within the borough, but situate at a distance from the house, and in a different parish; the house, in each case, being in the parish of Birmingham, and the land in the parish of Aston. The cases differ only in this circumstance, that, in the case of Capell, the house of which he is tenant, is of the annual value of 10*l.*, and, therefore, confers the borough qualification without the land in question; in that of Burton, the value of the house is, alone, less than 10*l.*, but, with the addition of the value of the land, amounts to that sum. Although this difference would create an inconvenient result in the former case, which does not arise in the latter, if the decision of the revising barrister be correct, it appears to us that both depend on the same question of construction, and must be governed by the same principle. As in these cases the ownership of the land confers a right to vote for the county, unless taken away by 2 W. 4, c. 45, the question turns on the construction to be given to the 24th section of that act, as connected with and expounded by *the 27th; the object of the first being to [*11 prevent land lying within a parliamentary borough from conferring a double franchise for the borough and the county, and the last defining the conditions of the borough franchise.

The object of the 24th section is, to exclude freehold estate occupied by the owner within the borough, which, by reason of its occupation, may confer the borough franchise, from also conferring a vote for the county within which it is situate. It enacts "that no person shall be entitled to vote in the election of a knight of the shire to serve in parliament in respect of his estate or interest as a freeholder in any house, warehouse, counting-house, shop or other building, occupied by himself, or in any land occupied by himself together with any house, &c., such house, &c., being, either separately, or jointly with the land so occupied therewith, of such value as would, according to the provisions hereinafter contained, confer on him the right of voting for any borough, whether he shall or shall not have actually acquired the right to vote for such borough in respect thereof."

On reading this section alone, there seems nothing to indicate that the legislature contemplated other than a freehold interest, either in the house or building which is the principal and essential part of the borough

franchise, or in the land which may be added to it as accessory: but the words "together with" in the first part of the clause, and the word "therewith" in the latter part, seem to import either a local contiguity or a similarity of tenure. This section, however, by reference, incorporates the provisions of the 27th section, which defines the conditions of the borough franchise, and must be explained by it. That section confers the franchise on every person "who shall occupy within any *12] borough, as owner or tenant, any *house, warehouse, counting-house, shop, or other building, being, either separately, or jointly with any land within such borough, occupied therewith by him as owner, or occupied therewith by him as tenant under the same landlord, of the clear yearly value of not less than 10*l*.

The question on this section is, whether land occupied by a party as owner within a borough, can be united with a house, &c., occupied by him as tenant, although not in any manner connected with it. And it appears to us, that, in order to give effect to all the words of the section, it is necessary to read the clause as applicable to the tenant or owner distributively, and to construe the words "occupied by him therewith as owner," as importing an ownership as well of the house as of the land to be united with it, in harmony with the provision by which tenanted land, to be united with a tenanted house, must be occupied under the same landlord. In this point of view, to enable a party to acquire the borough franchise, by adding the value of land to that of a house or building in itself insufficient, both properties must be occupied as owner or as tenant under the same landlord.

Upon the whole, therefore, we think that the land in these cases was not capable of being applied to the purposes of the borough franchise under the 27th section; and, consequently, is not excluded, under the 24th, from conferring the county franchise on the freeholder.

The result is, that, the appeal in both cases must be allowed, and the names of the appellants, and of those other persons whose cases are dependent upon the decision, must be restored to the register.

Decisions reversed.

*13] **Keane*, for the appellants, asked for costs. He submitted, that, although the respondents were the overseers, they were volunteers in the attempt to sustain the decision of the revising barrister: and he cited *The Queen v. The Justices of Cumberland*, 5 D. & L. 430, where it was held that a party who succeeds at the sessions upon an objection which turns out to be ill founded, and resists an application for a *mandamus* to correct the error, by showing cause against it, is within the general rule for the payment of the costs by the unsuccessful party; subject to exceptions which the court may make in particular cases, in the exercise of their general jurisdiction over the costs.

WILDE, C. J. (after consulting with the other judges). It does not appear to the Court that this is a case in which the respondents ought to pay costs.
Rule accordingly.

Borough of NEWPORT, Isle of WIGHT.

WHITE, Appellant; PRING, Respondent. Nov. 12.

Where the respondent appears, but the appellant does not,—the court will affirm the decision,
with costs.

THIS case being called on, and no counsel appearing on behalf of the appellant,

A. M. Skinner, for the respondent, prayed the judgment of the court, and his costs; citing Bage, app., Pakins, resp., 7 M. & G. 156, 8 Scott, N. R. 983, 1 Lutw. Reg. Cas. 255, and Crocker, app., The Overseers of Lambeth, resp., 7 M. & G. 156, n., 8 Scott, N. R. 985, 1 Lutw. Reg. Cas. 255, n.

Per curiam,

Decision affirmed, with costs.

*Borough of KIDDERMINSTER.

[*14

POWELL, Appellant; CASWELL, Respondent. Nov. 12.

The only notice that need be served upon the respondent, is the ten days' notice required by the 62d section of the 6 & 7 Vict. c. 18, of the appellant's intention duly to prosecute the appeal. Where the decision of the revising barrister has been reversed, the respondent not appearing,—the court will not allow the matter to be re-opened.

THIS case being called on, and no counsel appearing on behalf of the respondent,

Keating, for the appellant, upon an affidavit that the appellant had, on the 24th of October, given the respondent notice of his intention duly to prosecute the appeal, pursuant to the 62d section of the 6 & 7 Vict. c. 18, prayed that the decision of the revising barrister might be reversed.

Per Curiam,

Decision reversed.

Nov. 26. Willes, on a subsequent day, moved that the case might be restored to the paper, for argument, on the ground that no notice had been given, either to the respondent, or to his attorney, or to the agent, that the appeal had been set down. He admitted that due notice had been given of the appellant's intention duly to prosecute the appeal. [WILDE, C. J. That is all that is required.] The manner of proceeding upon these appeals is, by s. 62, to be "according to the ordinary rules and practice of the court with respect to special cases, so far as the same

may be applicable, and not inconsistent with the provisions of this act."

*15] The rule of court, Hilary, 4 W. 4, r. 6, which dispenses with the **concilium*, requires that notice shall be given to the opposite party, of the setting down of demurrers, special cases, and special verdicts. At all events, the case should not have been disposed of without a hearing: Cooper, app., Harris, resp., Austin's case, 7 M. & G. 97, 8 Scott, N. R. 921, 1 Lutw. Reg. Cas. 207. And, if the court had heard the appellant's case, it is quite impossible that they could have reversed the decision of the revising barrister. [MAULE, J. It must be assumed that the court read the case, and thought it clear that the decision of the revising barrister was wrong. TALFOURD, J. The only question in the case was, whether the residence of the *objector* was properly given: it was admitted that the *objection* was a valid one.] The court may, in its discretion, direct the case now to be argued.

WILDE, C. J. The ten days' notice required by s. 62 having been given, all was done that the practice of the Court requires. That notice is given in substitution of the notice provided for by the rule of Hilary term 4 W. 4. Strong grounds should be laid before the court, to induce them to allow a case to be re-heard.

The rest of the court concurring,

Willes took nothing.

*16]

*Michaelmas Term, 1850.

County of SURREY—Eastern Division.

JOHN LEE, Appellant; JOHN HENRY HUTCHINSON,
Respondent. Nov. 12.

A., possessed of a freehold estate of the yearly value of 5*l.*, mortgaged it for 100*l.*: the deed was declared to be a security for the principal sum only; and the power of sale was for payment of that sum only, at a day long past: but it was found as a fact that interest had been regularly paid upon the 100*l.* at 5 per cent.: Held, that A. had not an interest in land "to the value of 40*s.* by the year at the least above all charges," within the 8 H. 6, c. 7, and therefore was not entitled to be registered for the county.

JOHN LEE objected to the name of John Henry Hutchinson being retained on the list of voters for the parish of Croydon, in the eastern division of the county of Surrey.

The respondent was registered in respect of freehold land, the value of which was 5*l.* a year; and he was in possession of the estate. The property was mortgaged, to secure the repayment of 100*l.* lent to the respondent; but the mortgage did not extend to the interest on the loan.

The mortgage was dated in September, 1846; and recited that the respondent was indebted to the mortgagee in 100*l.* for money some time

previously lent, but that all interest on the same had been paid up to the date of the mortgage. The proviso for redemption was, on payment of the principal money only, in September, 1848; and the respondent's covenant was for payment of 100*l.* sterling, in September, 1848. The power of sale became absolute on default in payment of the principal money in September, 1848; and the sole trust as to the *proceeds [*17 of the sale, was, to retain the principal money, and to pay the balance to the respondent.

In every respect, the mortgage was made a security for the principal money only: but it was admitted that the respondent had regularly paid interest on the loan, at the rate of 5*l.* per cent. from the date of the mortgage.

The appellant contended that the respondent's name ought to be expunged, because he had not 40*s.* a year from the land, clear of all charges, after payment of interest on the loan.

The respondent urged that the interest was not charged upon the land, but was merely a personal liability; and that, therefore, his income derived from the estate was not subject to the payment of it.

The revising barrister held, that there was no charge upon the land, operating in reduction of the annual value to the respondent, so as to affect his right to be registered; and that, as the mortgagee had not taken possession, the respondent was entitled to remain on the register: and he retained his name accordingly.

If the court were of opinion that the respondent had not a freehold estate of the annual value of 40*s.* clear of all charges, his name was to be expunged from the list.

Corner for the appellant. This case is virtually decided by the decision of this court in *Copland, app., Bartlett, resp.*, 6 Man. Gr. & S. 18, 2 Lutw. Reg. Cas. 102, where it was held that a mortgagor in possession is not, under the 6 & 7 Vict. c. 18, s. 74, entitled to be registered as a voter, unless his estate in the land is of the value of 40*s.* *per annum* beyond the interest payable upon the mortgage. WILDE, C. J., there says: "The question is, whether the appellant is possessed of a freehold interest in land, to the value of *40*s.* by the year at least, [*18 above all charges, within the meaning of the statute 8 H. 6, c. 7. That statute has, upon various occasions, received the construction of a competent tribunal. The word 'charges' has, for a very considerable period, been understood to mean and include interest payable in respect of a mortgage. If a man receives 40*s.* with one hand, and with the other has to pay 30*s.* as a charge upon the land, can he be said to possess an interest in the land to the value of 40*s.* beyond all charges? The payment in such case would clearly be a charge upon his estate, in the sense of so diminishing the amount of his interest therein, as to remove him from the position of one whom the legislature has thought fit to intrust with the privilege of voting. The statute 28 G. 3, c. 36,

did not profess to vary the right of voting, but only to assist in carrying out the provisions of the 8 H. 6, c. 7, by compelling a party who claimed to vote in the election of a knight of the shire, to make a declaration that he had 'an estate of the clear yearly value of 40s. over and above the interest of any money secured by mortgage upon the said estate,' &c.,—giving a more distinct definition of the word 'charges' in the statute of 8 H. 6, c. 7." The only difference between that case and the present, is, that here the mortgage is expressed to be made to secure the principal sum of 100*l.* only. But the case finds that "the respondent had regularly paid interest on the loan, at the rate of 5*l.* per cent. *per annum*, from the date of the mortgage." The day of payment was passed; and there was an absolute power of sale. The 100*l.* is clearly a sum "secured by mortgage," within the terms of the statute 28 G. 3, c. 36. The case shows, that the sum thus charged upon the land absorbed its entire value. [V. WILLIAMS, J. What do you say was the *19] *annual charge* upon the land?] The sum which the *revising barrister finds to have been regularly paid from the date of the mortgage.

Byles, Serjt., for the respondent. The decision of the revising barrister was perfectly correct. The *property* is not charged with the payment of interest, though it may be that the mortgagor is personally liable for interest on the money borrowed. [JERVIS, C. J. There is no doubt about that. The question is, what is the value of the party's estate after payment of the 100*l.* charged upon it. MAULE, J. Can we infer necessarily from the facts found, that the voter has an interest in the land to the extent of 40s. a year?] Upon whom does the *onus probandi* lie? [JERVIS, C. J. The 27th section of the 2 W. 4, c. 45, requires the claimant to show that he is entitled to vote. If the burthen lay on the respondent, to show that he possessed an interest in land "to the value of 40s. by the year at the least, above all charges," has he, upon the statement submitted to us, substantiated his right to be put upon the register?] If the burthen of proof lay upon the respondent, it is submitted that the revising barrister has determined the fact affirmatively; for, he finds that "there was no charge upon the land operating in reduction of the annual value to the respondent, so as to affect his right to be registered." [MAULE, J. That is not correct. The revising barrister holds, in effect, that, to whatever extent the land is burthened, unless it be an *annual charge*, there is no charge operating to reduce the value.] If there be no annual charge, it is no objection, though the land be mortgaged to an amount exceeding its value. [MAULE, J. Can a man be said to have an estate of the clear yearly value of 40s., when he has mortgaged it for its value, or more?] He has here the freehold; and it is found to be worth 5*l.* a year. [MAULE, J. Having the land, means, *20] **having an interest in it, legal or equitable. To entitle him to vote, the party must have an interest in land of the clear yearly value of*

40s.] The whole question depends upon the 8 H. 6, c. 7, and the 28 G. 3, c. 36, s. 6, which imposes the freeholder's oath. The case of Copland, app., Bartlett, resp., proceeded mainly upon the latter statute. The respondent here has, within the terms of that statute, "an estate of the clear yearly value of 40s., over and above the interest of any money secured by mortgage upon the said estate, and also over and above all rents and out-goings payable out of or in respect of the estate, other than parliamentary, public, or parochial taxes." Then, the 74th section of the 6 & 7 Vict. c. 18, enacts that no mortgagee of any lands or tenements, shall have any vote in the election of a knight or knights of the shire, or in the election of a member or members to serve in any future parliament for any city or borough in which freeholders now have a right to vote, for or by reason of any mortgage estate therein, unless he be in the actual possession or receipt of the rents and profits thereof; but that *the mortgagor in actual possession*, or in receipt of the rents and profits thereof, shall and may vote for the same, notwithstanding such mortgage," &c. But it is submitted that the *onus* of showing the want of qualification is cast upon the appellant. The revising barrister finds that the respondent is in possession of an estate worth 5*l.* a year. It was for the other side to cut down the value, by showing that some *annual* payment is charged upon it.

Corner, in reply. The case does not show that there is an interest to the value of 40s. a year remaining in the mortgagor: it shows that interest at the rate of 5 *per cent.* has been paid, and that that was the whole value of the estate. [JERVIS, C. J. The question reserved for the court is simply this,—whether the *respondent had a freehold [*21 estate of the annual value of 40s. clear of all charges. How can we say that?] If the court feels any difficulty in determining the value, upon the facts stated, the case may be sent back to the revising barrister for amendment. But it is tolerably clear, from the whole context, that he thought the amount of the charge was not to be deducted; and that, if it were, the value of the interest would be less than 40s. a year.

JERVIS, C. J. Upon consideration, I do not think it necessary to send this case back to the revising barrister for amendment; but I think, that, upon the facts he has submitted to us, his conclusion is an incorrect one. The voter is the owner of an estate, of the yearly value of 5*l.*, which he has mortgaged for 100*l.*, the conveyance being defeasible on payment of the 100*l.*, *without interest*, on a certain day, with a power of sale on default. The day of payment is past; and the case finds that interest on the 100*l.*, at the rate of 5*l. per cent. per annum*, has been regularly paid from the date of the mortgage to the present time. So that, if the interest be a charge upon the land, the entire value of it is swallowed up. The question, then, is, whether these facts bring the case within the 8 H. 6, c. 7,—whether the voter had an interest in the land "to the value of 40s. by the year at the least, above all charges." The first point to be

considered is, whether the interest which the party is admitted to have paid, be a charge upon his estate within the meaning of that statute. Now, it is clear that the 100*l.* is a charge upon the estate. In one view of the case, it might be unimportant to consider whether the interest was a charge or not. The 100*l.* beyond all doubt *is* a charge. But it is clear, upon the authority of Copland, app., Bartlett, resp., that, if the *22] interest as well as the *principal were secured by the mortgage, the payment of interest would go in reduction of the value of the estate, and the party would not be entitled to vote. How, then, are we to ascertain the value of the charge? Although not a charge by the deed, we are justified, by what appears in the case, in coming to the conclusion that there has been some agreement between the parties, that, if the mortgagor will pay interest on the 100*l.* at the rate of 5*l. per cent. per annum*, he shall remain in undisturbed possession. Does not that satisfy the 8 H. 6, c. 7? It falls within the express terms of the oath prescribed to the voter by the 28 G. 3, c. 36, viz. that he has "an estate of the clear yearly value of 40*s.*, over and above the interest of any money secured by mortgage upon the said estate." What estate has the party here over and above the interest of the 100*l.* secured by the mortgage? The land is mortgaged for 100*l.*; the mortgagor, by a parol agreement, has engaged to pay 5*l. per cent.* interest thereon; and 5*l. per annum* is found to be the extreme value of the land. The real interest, therefore, which the voter has, is nothing. Consequently, I am of opinion that the respondent has failed to show himself entitled to be registered, and that the decision must be reversed.

MAULE, J. I am of the same opinion. In dealing with these cases, we are not to treat them with the same strictness which we should apply to pleadings coming before us upon special demurrer; but must give them a fair and reasonable construction. Applying that principle to what is found in this case as to the payment of interest, I think we shall find no difficulty in coming to a right conclusion. It appears that the voter is possessed of an estate of the yearly value of 5*l.*; and that he borrows a sum of 100*l.*, to secure which he mortgages his estate, the mortgage deed reciting that all *23] *interest had been paid up to the date of the mortgage.(a) The deed is not made as a security for the future accruing interest: but the case finds that the mortgagor has in fact paid interest at 5*l. per cent.* upon the sum borrowed, down to the present time; and the day of payment of the principal sum is long past. Under these circumstances, I think we are justified in inferring that there was a contract between the parties, though not expressed in the mortgage deed, for the payment of 5*l. per cent.* interest. And I think that the interest so agreed to be

(a) *Quære*, whether it is not implied in this recital, that interest at the same rate as had been paid before, should continue to be payable from the date of the mortgage. If so, the interest up to September, 1848, might be recovered in debt or covenant, and subsequent interest as damages for the detention.

paid is a charge upon the land, within the meaning of the statutes. The 28 G. 3, c. 36, may be considered as a legislative exposition of the former statutes upon the subject, adding another condition to the right of voting, *viz.* that the voter shall take a certain oath—that he has “an estate of the clear yearly value of 40s., over and above the interest of any money secured by mortgage upon the said estate.” The true sense of that oath, as it seems to me, is this—that the voter has an interest in the land to the extent of 40s. a year, after payment of all interest of any money secured by mortgage upon the estate. It seems to me to be perfectly clear that the substantive to which the participle “secured” refers, is “money” and not “interest.” That seems to me to be the literal construction of the words used by the legislature. If that literal construction led to any inconvenience or inconsistency, we should have to seek for some different mode of reading the statute: but it seems to me exactly to coincide with the spirit and intention of the legislature. The spirit of the act is, that voters shall have *a certain description of property, and shall be of a certain power of expenditure. If you hold [*24 that a man possessing property that would entitle him to vote, may contract for a loan of money, for which he is to pay interest to the full value of the land, and still retain his right to vote, because the instrument by which the money borrowed is secured makes the principal sum only a direct charge upon the land, you violate the whole spirit of the legislation upon this subject. Here, the voter is dependent upon the will of his creditor, who has power to turn him out of possession at any moment, if the interest is unpaid. I think that both the letter and the spirit of the statutes show that a person so circumstanced is not a person who is in a situation to expend 40s. by the year, out of “free land or tenement,” and therefore not entitled to vote.

V. WILLIAMS, J. I do not regret that this ingenious scheme invented for the purpose of evading the statutes, should fail. The different statutes that have since passed upon the subject, preclude us from taking the strict lawyer-like view of the word “charge” in the 8 H. 6, c. 7, and compel us to adopt the popular meaning. The interest of a mortgage debt being in this sense a charge upon the estate, I think it is not the less a charge because not in terms charged upon the land by the mortgage deed. In each case the value of the land to the party is reduced by the payment of interest upon the mortgage debt. The decision of the barrister is clearly wrong.

TALFOURD, J. I am of the same opinion. It is clear that this person retains possession of the land only so long as he pays the full value of the estate in the shape of interest. Decision reversed.

END OF THE REGISTRATION CASES.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
AND UPON
WRITS OF ERROR,
IN
Trinity Vacation,
IN THE
TWELFTH YEAR OF THE REIGN OF VICTORIA.

The judges who usually sat in *banco* during these sittings were—

COLTMAN, J.
MAULE, J.

CRESSWELL, J.
V. WILLIAMS, J.

**MARIA PILGRIM, CHARLES HENRY PILGRIM, JOHN BUNCE
PILGRIM, CHARLES PILGRIM, and THOMAS PENROSE,
Clerk, v. THE SOUTHAMPTON and DORCHESTER RAILWAY
COMPANY.**(a) *June 12.*

A cause having been made a remanet, a correspondence took place between the respective attorneys with a view to a reference, which failed:—Held, that the master exercised a proper discretion in disallowing copies of this correspondence, as part of the briefs, in taxing the costs of the cause.

Costs of preparing plans, for the better elucidating of the case before the court and jury, may be allowed, at the discretion of the master.

The master is the sole judge of the proper number of witnesses to be allowed in support of the same matters.

Upon the taxation of the defendant's costs of issues upon which he has succeeded, an affidavit that the witnesses whose expenses he claims were called *exclusively* to support those issues, is not indispensable, provided the master is satisfied of the fact by other means.

(a) This and the four following cases were disposed of during the term.

COVENANT. The declaration stated, that, theretofore, to wit, on the 27th of June, 1846, by an indenture made between the defendants of the one *part, and the plaintiffs, therein described as trustees and executors appointed by the last will and testament of Charles Pilgrim, deceased, of the other part,—profert,—after reciting, amongst other things, that, by deed-poll in writing under the hands and seals of the said parties to the said indenture of the second part, bearing even date with the said indenture, the said parties to the said indenture of the second part, as such executors as aforesaid, did assign unto the said company, their successors and assigns, certain parcels of land situate in the parish of All Souls, in the town of Southampton, to hold to the said company, their successors and assigns, for all the residue then unexpired of the term of 50 years granted therein by indenture bearing date the 29th of September, 1807, and made between W. Fitzhugh of the one part, and Maria D. Grosvenor of the other part,—the defendants, for themselves, their successors and assigns, did covenant, promise, and agree, with and to the plaintiffs, and with each and every of them, and their respective executors, administrators, and assigns, that they the said company, their successors and assigns, should and would, at their own expense, make and construct a tunnel, for the purpose of the said railway, through or under such part of the said lands as lay eastward of the point marked A A on the plan endorsed on the said indenture; and also that the said tunnel, or such part thereof as should pass or be made under such part of the said *lands as should be used as a lawn or shrubbery, should be made in such manner as to occasion as little disturbances of the trees or shrubs planted or growing thereon as practicable, and in case any damage should happen to the said trees or shrubs, or the said lawn, through the making or constructing of the said tunnel, the same should be made good and repaired by the said company, and be placed in all respects in the same state and condition as the same were previously to such damage having taken place; and also that they, the said company, their successors or assigns, should and would, as soon as practicable after the formation of the said tunnel, cover in the same with good earth mould, to the then present level of the said land, and so as to make the same even with the surface of the adjoining land, except in such places where the upper part of the said tunnel should be above the then present level of the said land, in which places the same should be in like manner covered to the depth of at least two feet, and should in all respects be sloped or formed to the satisfaction of the said parties thereto of the second part, their executors, administrators, or assigns, or of their surveyor; and also that they, the said company, their successors or assigns, would, upon the request of the said parties thereto of the second part, their executors or administrators, but at the expense in all things of the said company, their successors or assigns, make, execute, and deliver unto the said parties

thereto of the second part, their executors, administrators, or assigns, a good, valid, and effectual lease in the law of such part of the said piece of land through or under which the said tunnel should be so made, including all the land conveyed by the said deed-poll eastward of and from the point marked A A in the said plan, for all the residue which *28] should be then unexpired of the *said term of fifty years (except the last day thereof), at and under the yearly rent of 6*l.*, which said lease should contain all usual or necessary covenants, clauses, and stipulations,—as by the said indenture, &c.: That they, the plaintiffs, had performed and observed all things in the said indenture contained on their part to be observed and performed: Yet that the defendants broke their said covenant, in this, to wit, that, although a reasonable time for the making and constructing of the said tunnel had elapsed before the commencement of this suit, yet the defendants did not nor would make or construct a tunnel for the purpose of the said railway through or under such part of the said lands as lay eastward of the point marked A A on the said plan, but, on the contrary thereof, after the making of the said indenture, to wit, on the 80th of June, 1846, and on divers days between that day and the commencement of the suit, made and constructed, instead of such tunnel as aforesaid, a cutting of great length, depth, and width, to wit, of the length of 1000 feet, of the depth of thirty feet, and of the width of forty feet, through a large part of the said portion of land lying eastward of the said point, for the purpose of the said railway; and that, by reason and in consequence thereof, a great quantity of the earth and soil of certain closes of the plaintiffs, lying and being respectively on each side of the said land, was cut and dug and carried away, a great quantity of the surface of the said closes respectively was removed and destroyed, and divers trees, shrubs, and underwood of the plaintiffs then growing and being upon the said surface so removed and destroyed, to wit, one hundred trees, three thousand shrubs, one rood of underwood, and ten roods of turf, of great value, to wit, of the value of 200*l.*, were cut down, prostrated, felled, rooted up, destroyed, and *29] *carried away: That the defendants further broke their covenant, in this, to wit, that, although the said company did, after the making of the said indenture, in part performance of their said covenant in that behalf, make and construct a tunnel, to wit, of the length of one hundred feet and of the breadth of fifty feet, under a certain portion of that part of the said lands so as aforesaid assigned and conveyed to the said company, which lay eastward of the said point marked A A; and, although the said last-mentioned portion of the said lands, before and at the time of making the said indenture, and from thence continually to and at the time of the commencing of the making of the said tunnel, was used as a lawn or shrubbery, and there were then planted and growing thereon divers trees and shrubs, to wit, two hundred trees and five hundred shrubs, of great value, to wit, of the value of 500*l.*, yet that the

said tunnel so made as aforesaid, was not, nor was any part thereof, made in such manner as to occasion as little disturbance of the said trees and shrubs as practicable, but that, on the contrary thereof, the said company, after the making of the said indenture, to wit, on the 30th of June, 1846, and on divers other days and times between that day and the commencement of this suit, made and constructed the said tunnel in so careless, unskilful, and improper a manner, and conducted themselves so improperly in that behalf, that, by and through the mere negligence and improper behaviour of the defendants in that behalf, divers, to wit, one hundred trees and one thousand shrubs of the plaintiffs, then growing and being on the said portion of land through and under which the said tunnel so passed as aforesaid, and of great value, to wit, of the value of 100*l.*, were wholly destroyed, and divers, to wit, one hundred other trees and one thousand other shrubs of the plaintiffs *then growing and being in and upon the said portion of the said lands, and of great value, to [*30 wit, of the value of 100*l.*, were greatly injured and damaged: That the defendants further broke their covenant, in this, to wit, that, although, after the making of the said indenture, to wit, on the day and year last aforesaid, great damage, to wit, to the amount of 200*l.*, happened and was done to the said last-mentioned trees and shrubs and lawn, in and through the making and constructing of the said tunnel, yet that the same was not, nor was any part thereof, made good or repaired by the defendants, nor were the said trees, shrubs, and lawn placed in all respects, or in any respect, in the same state or condition as the same were in previously to such damage having taken place, although a reasonable time for making good and repairing the said damage, and reinstating the said trees, shrubs, and lawn, had elapsed before the commencement of the suit, to wit, on the day and year last aforesaid: That the defendants further broke their covenant, in this, to wit, that, although the upper part of the said tunnel so made and constructed by the said company as last aforesaid in and under the portion of the said lands in divers parts of the said tunnel, at the time of making the said indenture, and of commencing the said tunnel, was not above the level of the said lands, and was below the surface of the adjoining lands, and although a reasonable time for covering in the said tunnel had elapsed, and it was practicable for the said company to have covered in the same before the commencement of this suit, to wit, on the day and year last aforesaid, yet that the defendants did not nor would, at any time before the commencement of this suit, cover in the said tunnel with good earth mould, to the level of the said land at the time of making the said indenture, and so as to make the same even with the surface *of the adjoining land in the said parts aforesaid, but wholly ne- [*31 glected and refused so to do; and although the upper part of the said tunnel, in other parts thereof, at the several times last aforesaid, was above the level of the said land, and although such reasonable time as aforesaid had elapsed, and it was practicable to cover in the said last-

mentioned parts before the commencement of the suit, to wit, on the day and year last aforesaid, yet the defendants did not nor would then, or at any other time, cover in the said tunnel, at the said last-mentioned parts, or any of them, with good earth mould, to the depth of at least two feet, and did not nor would slope or form the same to the reasonable satisfaction of the plaintiffs, or of their surveyor, but then wholly neglected and refused so to do: And that the defendants further broke their covenant, in this, to wit, that, although the defendants, after the making of the said indenture, and before the commencement of the suit, made and constructed such tunnel as aforesaid, in, through, and under part of the said lands lying eastward of the said point marked A A; and although the plaintiffs were, at all times before the commencement of the suit, ready and willing to accept from the defendants a good, valid, and effectual lease of such part of the said piece of land through or under which the said tunnel was so made as aforesaid, including all the land conveyed by the said before-recited deed-poll, eastward of and from the said point marked A A, for the said residue of the said term, except the last day thereof, in the terms so as aforesaid covenanted and agreed,—whereof the defendants then and always had notice; and although a reasonable time after the making of the said tunnel had elapsed before the commencement of the suit, to wit, on the day and year last aforesaid; and although more than the last day of the said term was still unexpired; *32] yet the defendants did not nor would make, execute, *or deliver unto the plaintiffs such good, valid, and effectual lease in the law, of such part of the said piece of land through or under which the said tunnel had been made, including all the land conveyed by the said deed-poll, eastward of and from the point marked A A in the said plan, for all the residue then unexpired of the said term of fifty years, except the last day thereof, on the terms aforesaid, but then wholly neglected and refused, and still did wholly neglect and refuse so to do: to the damage of the plaintiffs of 1000*l.*, &c.

The defendants pleaded,—first, to the whole declaration, *non est factum*.

Secondly,—to the first breach,—that the defendants, after the making of the said indenture in the declaration mentioned, and within a reasonable time in that behalf, and before the commencement of the suit, to wit, on the 30th of June, 1846, did, at their own expense, make and construct a tunnel, for the purpose of the said railway, through and under such part of the said lands as lay eastward of the point marked A A on the said plan in the said indenture mentioned, according to the terms of the said indenture and the said covenant of the defendants in that behalf; concluding to the country.

Thirdly,—to the same breach,—that they the defendants did not make or construct, instead of such tunnel as aforesaid, a cutting of great length and width, as in the declaration in that behalf mentioned, through a part of the said portion of land lying eastward of the said point, for

the purpose of the said railway, in manner and form as the plaintiffs had in their said declaration in that behalf alleged; concluding to the country.

Fourthly,—to the second breach,—that the said tunnel in the declaration in that behalf mentioned, was made in such manner as to occasion as little disturbance of the said trees and shrubs there planted and growing, *as practicable, according to the terms of the said indenture [*33 and the said covenant of the defendants in that behalf; and that the defendants made and constructed the said tunnel in a careful, skilful, and proper manner, and without any negligence or improper behaviour in that behalf; concluding to the country.

Fifthly,—to the third breach,—that the said trees and shrubs and lawn therein in that behalf mentioned, were not, nor were any of them, damaged or injured in and through the making and constructing of the said tunnel, in manner and form, &c.; concluding to the country.

Sixthly,—to the same breach,—that the damage so done to the said trees, shrubs, and lawn, in and through the making and constructing of the said tunnel, as in the declaration in that behalf mentioned, was, after the making and constructing of the said tunnel, and within a reasonable time in that behalf, and before the commencement of the suit, to wit, on the day and year last aforesaid, made good and repaired by the defendants, and the said trees and shrubs and lawn were placed in all respects in the same state and condition as the same were previously to such damage having taken place; concluding to the country.

Seventhly,—to the fourth breach,—that, after the making of the said indenture, and within a reasonable time in that behalf, and before the commencement of the suit, to wit, on the day and year last aforesaid, the defendants did cover in the said tunnel where the same was not above the level of the said lands, and was below the level of the adjoining lands, with good earth mould, to the level of the said land at the time of the making of the said indenture, and so as to make the same even with the surface of the adjoining land, in the parts in that behalf aforesaid; and, where the said tunnel was above the level of the said land, they the defendants did *also then cover in the said tunnel at the said last-mentioned parts [*34 with good earth mould, to the depth of at least two feet, and did then slope and form the same to the reasonable satisfaction of the plaintiffs and their surveyor, according to the terms of the said indenture, and the said covenant of the defendants in that behalf; concluding to the country.

Eighthly,—to the fifth breach,—that, although the defendants were always after the making of the said indenture ready and willing to make and execute and deliver to the plaintiffs a good, valid, and effectual lease in the law of such part of the said piece of land through or under which the said tunnel was so made as aforesaid, including all the land conveyed by the said deed-poll, eastward of and from the said point marked A A, for the residue of the said term, except the last day thereof, according

to the terms of the said indenture and the said covenant of the defendants in that behalf, whereof the plaintiffs continually had notice, yet that the defendants were not, at any time before the commencement of this suit, requested by the plaintiffs, or any of them, to make, execute, or deliver to the plaintiffs such good, valid, and effectual lease as aforesaid, according to the terms of the said indenture; verification.

Ninthly,—to the same breach,—that, although the defendants were always, after the making of the said indenture, ready and willing to make and execute and deliver to the plaintiffs, a good, valid, and effectual lease in the law, of such part of the said piece of land through or under which the said tunnel had been made, including all the land conveyed by the said deed-poll, eastward of and from the said point marked A A, for the said residue of the said term, except the last day thereof, according to the terms of the said indenture and the said covenant of the defendants in that behalf, whereof the plaintiffs continually had *35] notice, yet that the *plaintiffs were not at any time ready and willing to accept the same, in manner and form as the plaintiffs had in that behalf alleged, but, on the contrary thereof, the plaintiffs refused continually to accept the same, and hindered and prevented the defendants from making and executing and delivering the said lease; concluding to the country.

Tenthly,—to the first four breaches,—that, after the making of the said indenture, and after the committing of the said several alleged breaches of covenant, and before the commencement of this suit, to wit, on the 1st of July, 1846, they the defendants paid to the plaintiffs, and the plaintiffs then accepted and received of and from the defendants, a large sum of money, to wit, 500*l.*, in full satisfaction and discharge of the same alleged breaches of covenant, and of all damages in respect thereof; verification.

The plaintiffs joined issue on the first, second, third, fourth, fifth, sixth, and seventh pleas, and traversed the tenth plea, and entered a *nolle prosequi* as to the fifth breach. The defendants joined issue upon the traverse to the tenth plea.

The cause was tried before COLERIDGE, J., at the Winchester summer assizes, 1848, when a verdict was found for the plaintiffs, with one farthing damages, on the first, fifth, sixth, seventh, and tenth issues, and for the defendants, on the second, third, and fourth issues.

Upon taxing the costs of the plaintiffs upon the issues found for them, the master disallowed the following items:—

The cause had been taken down for trial at the spring assizes, 1848, and was made a remanet. In the interim, considerable correspondence took place between the attorneys for the parties respecting this and another action then pending between the company and one of *the *36] present plaintiffs, with a view to a settlement of all the matters in difference, by reference or otherwise. An order to admit these letters was obtained by the plaintiffs; and an order was likewise obtained by the

defendants to admit the correspondence, and also a long affidavit made by one of the plaintiffs upon an application for an injunction to restrain the company from building a station on part of the land in question. The plaintiffs' attorneys caused copies of these several documents to be made for counsel, amounting together to thirty-four brief sheets,—which, with the additional fee thereon, the master declined to allow.

At the trial, three plans were produced by the plaintiffs, and used by the court and jury,—one showing the state of the premises in question before the works were commenced by the company,—the second, their state during the progress of the works,—and the third, their condition when the works were completed. The costs of these plans, as well as those of the attendance (to prove their accuracy) of the surveyor who had prepared them,—about twenty guineas in the whole,—the master disallowed.

The master also allowed the expenses of one only of two witnesses named Stannard and Burt, both in the employ of the company, who were both called to prove the same facts in support of the seventh issue.

Upon the taxation of the defendants' costs of the issues found for them, they claimed a sum of 100*l.* 9*s.* 3*d.*, for payments to seven witnesses, viz. Moorsom, Clegg, Beatty, and Curtis, civil engineers, Connor and Steinhausier, surveyors, and Walton, surveyor of railway-works. With regard to these witnesses, the affidavit of increase stated that "all the said witnesses were, in the judgment and belief of the deponent, material and necessary for the defendants." On the part of the plaintiffs, it was objected that this was insufficient, and *that the affidavit ought to have alleged expressly that the witnesses were material and neces- [*37 sary *exclusively* in respect of the issues found for the defendants, and that they did not attend to give evidence, nor did they give any evidence, in respect of the issues found for the plaintiffs. Two of these, viz. Curtis and Steinhausier, were not called.(a) The master, having looked at the pleadings, and at the evidence that was given by such of these witnesses as were called, allowed the whole; observing that the issues on which the plaintiffs had succeeded, were immaterial issues, and that the defendants had substantially succeeded in the cause,—the plaintiffs having obtained a verdict for a farthing merely upon a point of law.

Greenwood, in Trinity term last, on behalf of the plaintiffs, moved that the master might be directed to review his taxation. The affidavit upon which he moved, in addition to the facts above set forth, stated that four of the witnesses allowed in the defendants' costs, gave material evidence for the defendants at the trial on some of the issues that were found for the plaintiffs, and particularly on the seventh. 1. He submitted, that, under the circumstances, it was essential that the plaintiffs' counsel should

(a) Vide *Bagnall v. Underwood*, 11 Price, 510; *Hanhorn v. Thomas*, 3 J. P. Smith, 361; *Adamson v. Noel*, 2 Chitt. Rep. 200; *Benson v. Schneider*, 7 Taunt. 337, 1 J. B. Moore, 76 (S. C., not S. P., 7 Taunt. 272); *Holt*, N. P. C. 416; *Morison v. Harmer*, 5 Scott, 410.

have copies of the correspondence and affidavit, and therefore that they ought to have been allowed as part of the briefs,—especially as the defendants' attorneys had made them, and particularly the affidavit, material, by getting an order to admit. The plaintiffs' attorneys would hardly *38] have exercised a sound discretion if they had omitted to *furnish them. [MAULE, J. The correspondence and affidavit may have been very proper to submit to counsel, though not material to the cause. Whether or not it was proper to allow the expense of these copies, was purely a question for the discretion of the master. Suppose the plaintiffs had been called on to admit the company's deed, would it have been requisite to brief it at all?] That clearly would be a case of excess.

2. The plans clearly ought to have been allowed. They were most material, and almost indispensable to enable the court and jury to understand the merits of the case. Generally speaking, no doubt, surveys and experiments that are preparatory to the action, or made with a view to qualify the witnesses to give their evidence at the trial, are not allowed: but it is otherwise with respect to plans, which, in many cases, most materially assist the court, and save the expense of numerous witnesses. [MAULE, J. I own I think the master may have been somewhat over strict in disallowing for the plans, which one naturally looks for in many cases.]

3. The expenses of several of the plaintiffs' witnesses, who were called to prove the issues on which the plaintiffs succeeded, were disallowed, because the master thought they were called only to prove damage, and the plaintiffs recovered nominal damages only. That clearly was no ground for their disallowance.

4. As to the evidence of Stannard and Burt, seeing that they were servants of the company, it certainly was not unreasonable to call both of them, though they proved the same facts. The plaintiffs' attorneys would hardly have been justified in relying upon one of them only.

5. With respect to the defendants' costs, the affidavit of increase was insufficient; it should have alleged positively that the witnesses whose *39] expenses were *claimed, were called *exclusively* to support the issues on which the defendants succeeded at the trial: *Crowther v. Elwell*, 4 M. & W. 71. A reference to the notes will show that their evidence was not so limited.

WILDE, C. J. The correspondence as to the proposed reference, and the affidavit in Chancery, clearly were not material to the merits of the cause, though it may have been prudent to put counsel in possession of them. It is exceedingly difficult to draw the line in such cases; and, if the master had allowed that part of the briefs, I should not have felt disposed to quarrel with his determination. The result of the complaint in this respect, is, that the master has not allowed a sufficient length of brief. That is a matter which is so exclusively within the discretion of the master, that the court will not interfere without some very special

reasons.(a) And we are of opinion that none have been shown, to take this case out of the ordinary rule. The rule ought not, I think, to be granted as to that : but, upon the other points, it may go.

Barstow now showed cause. It was for the master to determine whether or not the plans ought to be allowed. The Courts have equally declined to interfere, where he has allowed and where he has disallowed expenses falling within that class : *May v. Selby*, 4 M. & G. 142, 4 Scott, N. B. 727 ; *Ormerod v. Thompson*, 16 M. & W. 860. A plaintiff must not cast upon his opponent the expense of putting a man in the situation of acquiring knowledge to make him a witness in the cause. Besides, the master was of opinion that the plans were as useful in support of the issues *on which the plaintiffs failed, as in support of those upon which [40 they succeeded : they therefore fell within the ordinary rule. [The master (Mr. Ray) intimated that that was in fact the ground upon which he had proceeded : and he stated, that, in another case, between the same parties, arising out of the same matter, he had allowed the expense of plans.]

No precise form of affidavit is requisite before the master. He generally looks at the briefs, to see what were the issues, and what the evidence applicable to each, and regulates his discretion accordingly.

The rule as to the disallowance of witnesses whose evidence is applicable as well to issues upon which the party fails as upon those on which he succeeds, is not disputed. The master, in taxing the defendants' costs, was satisfied that all the witnesses whom he allowed were substantially called only in support of the issues upon which the defendants succeeded. There is no ground to find fault with the manner in which he has applied the principle.

Greenwood, in support of his rule. In *Holmes v. Holmes*, 2 Bingh. 75, 9 J. B. Moore, 158, it was distinctly held that the allowance of preparing plans, even where the cause does not proceed to trial, is for the discretion of the master. The cases of preliminary experiments stand altogether upon a different footing.(b) It would have been impossible to try a cause of this description in a satisfactory manner without the aid of plans.

2. The master disallowed the costs of several witnesses who were called in support of issues upon which the plaintiffs succeeded,—on the ground that they *were called merely to speak to damage. That clearly [41 was not a ground upon which the master could legitimately proceed.

3. The master has not exercised a sound discretion in refusing to allow the costs of both the witnesses *Stannard* and *Burt*,—for the reasons already urged.

(a) Vide *Sharp v. Ashby*, 12 M. & W. 732.

(b) Vide *Severn v. Olive*, 3 B. & B. 72, 6 J. B. Moore, 235 ; *Bayley v. Beaumont*, 11 J. B. Moore, 497.

4. The affidavit of increase ought distinctly to show that the witnesses whose expenses are claimed, were called *exclusively* in support of issues upon which the party calling them has been successful,^(a) so as to bring them within the rule in *Lardner v. Dick*, 2 C. & M. 389, 2 Dowl. P. C. 333 (per nom. *Larnder v. Dick*), *Crowther v. Elwell*, 4 M. & W. 71, and *Freeman v. Rosher*, 18 Law Journ. Q. B., N. S. 105.

WILDE, C. J. This rule was obtained on four several grounds,—first, that, in taxing the plaintiffs' costs, the master improperly disallowed the expense of plans,—secondly, that several witnesses called for the plaintiffs were disallowed, on the ground that they were called to prove damage, whereas the damages were assessed at a farthing only,—thirdly, that the master allowed only one of two witnesses (both being servants of the company) who were called to speak to the same facts,—fourthly, that, in taxing the defendants' costs of the issues found for them, the master *42] allowed several *witnesses whose evidence it is suggested was equally applicable to issues found for the plaintiffs as to issues found for the defendants, and that the usual affidavit, that the witnesses were called exclusively to support the issues upon which the defendants succeeded, was not produced.

1. It was contended that plans are generally useful to aid the jury in coming to a right conclusion, and are not to be looked upon in the same light as surveys or experiments made by scientific persons in order to qualify themselves to give evidence. And I am inclined to think that argument correct. But, at the same time, it must depend upon the circumstances of the particular case, whether plans should or should not be allowed. The court is always disposed to attend very much to what passes before the master, who has generally the best means of coming to a satisfactory conclusion upon that which is merely a matter of discretion. Here, the master has carefully looked into the matter; and he reports to us that he was of opinion, that, although the plans might have been convenient as to other parts of the case, yet they were so decidedly useful upon the issues on which the plaintiffs failed, that they fell within the general rule which has been adverted to, and ought not to be allowed. I think he was right.

2. With respect to the second objection, if the ground of the disallowance of these witnesses was, that they were called to speak to damages, I own I should have thought that the matter was fit to be reconsidered. But that appears not to have been so. A plaintiff is not justified in

(a) The rule is thus stated in *Dax's Practice of the Masters' Office*, p. 273:—"Where witnesses are claimed on immaterial issues, the master requires an affidavit of increase, stating clearly and positively that such witnesses were material and necessary for the plaintiff or defendant, as the case may be, upon the particular issues found for him, and that they did not attend in respect of any of the issues found against him. For the party who is entitled to the general costs of the cause, the affidavit of increase need only extend to the fact that the witnesses were material and necessary upon the issues found for him." For a form of affidavit applicable to such cases, see *Richards's Costs*, Appendix.

burthening a case with an unnecessary number of witnesses. There is no reason why he should be allowed to disregard the expense to be thrown upon his opponent. The master has allowed what he thought a sufficient number of witnesses. The number of witnesses to be allowed, is obviously one of the fittest *matters to be left to the master's discretion,—a matter on which he is peculiarly called upon to exercise [*48 a cautious judgment. I cannot see that the master has here exercised an unsound discretion in that respect.

3. With regard to the witnesses Stannard and Burt, it is said, that, they being servants of the company, it would not have been safe for the plaintiffs to rely upon one of them only. If the master had had any grounds laid before him to show that it was reasonable to call them both to prove the same facts, he would undoubtedly have allowed the expenses of both. No such ground having been laid before him, I think he very properly declined to allow more than one.

4. As to the last ground of objection,—it is undoubtedly true that an affidavit such as is suggested by Mr. *Greenwood*, has usually been produced before the master. But it is for the master to say whether or not such an affidavit is necessary. Upon the present occasion, the master seems to have thought that he had ample means to regulate his judgment, without such affidavit. But with respect to the witnesses whose allowance is objected to, my brother CRESSWELL, who has gone over the judge's notes, is of opinion that two of them, viz. Beatty and Connor, were called as well upon issues that were found for the plaintiffs as upon those that were found for the defendants. The expenses of these two witnesses, therefore, viz. 14*l.* 6*s.* and 6*l.* 10*s.*, ought not to have been allowed.

Upon the whole, therefore, I am of opinion that all the objections fail, except that portion of the last one which relates to the evidence given by Beatty and Connor; and that the allocatur should be amended in this respect.

The rest of the court concurring,

Rule absolute accordingly.

*SMITH v. THOMPSON. June 8.

[*44

Prima facie, the construction of written documents is for the judge: but, where it is shown by extrinsic evidence that the terms are ambiguous, evidence is admissible to explain the ambiguity; and then it is for the jury to say in which sense the ambiguous expressions were used. A. was engaged by B., as clerk, under a contract of hiring for two years, to conduct the business of a shipping agent at Southampton. In the course of such employ, it was the duty of A. to pay freight, dock-dues, &c., to meet which B. remitted the necessary funds. A. wrote to B. for a remittance of 140*l.*, enclosing an account of the purposes for which it was required,—one of them being the payment of 30*l.* for salary due to himself. Ten days afterwards, B. sent A. 100*l.* enclosed in a letter directing him to apply the money for "business purposes." A. having appropriated 30*l.* of the money in satisfaction of his salary, B. discharged him. In assumpsit by A. against B. for breach of the contract of hiring, B. pleaded a plea justifying

the discharge of A., on the ground of his having wrongfully and improperly misappropriated the money remitted, and wrongfully and improperly disobeyed B.'s orders to apply the money to "business purposes." The judge left it to the jury to say whether the plaintiff had been guilty of any wrongful and improper misappropriation of the moneys intrusted to him by the defendant, or of any wrongful or improper disobedience of orders:—Held, that this was a proper direction; and that the judge was not bound to tell the jury that it was not necessary, to justify the dismissal of the plaintiff, that he should have been guilty of any moral delinquency. Held also, that, in awarding a sum equal to twelve months' salary, the plaintiff having been discharged after about one quarter's service,—the jury had not given excessive damages.

ASSUMPSIT, on a contract of hiring. The first count (a) was abandoned at the trial.

The second count stated, that, theretofore, and at the time of making the agreement thereafter mentioned, the plaintiff had been for the space of six calendar months, and then was, in the service of the defendant as clerk, and as such clerk had conducted, and was then conducting, the defendant's business of a custom-house and shipping agent, at Southampton; that, thereupon, afterwards, to wit, on the 29th of March, 1847, in consideration that the plaintiff, at the request of the *defendant, would
 *45] continue in the service of him, the defendant, as clerk, to conduct his, the defendant's, business of a custom-house and shipping agent, at Southampton aforesaid, for the term of two years, he, the defendant, then promised the plaintiff to continue him in such service for the said term of two years, and to pay him the annual salary of 150*l.* for the first year, and 160*l.* for the second year's service, and (with the exception of such overland agency business as the defendant was then in possession of) also to pay to the plaintiff a sum of money equal to 50*l.* *per cent.* on the gross profits (without deduction for expenses, except where payments should have been actually made in reference to the business itself), on all baggage business, insurance-agency business, and on all and every business whatsoever transacted by the defendant at Southampton aforesaid, during such term of two years as aforesaid, save and except only on such overland agency business as was then in the defendant's possession as aforesaid; that, although the plaintiff, confiding in the said promise of the defendant, did continue in the service of him, the defendant, as clerk, upon the terms aforesaid, for a long space of time, to wit, until the 13th of August, 1847, which had elapsed before the commencement of this suit, and although the plaintiff had always been ready and willing, and then offered, to continue in the service of the defendant for the residue of the said term of two years, upon the terms aforesaid; yet that the defendant, not regarding his said promise, did not nor would continue the plaintiff in the service of him, the defendant, as clerk, for the said term of two years, but, on the contrary thereof, afterwards, to wit, on the day and year last aforesaid, and before the expiration of the said term of two years, then wholly refused so to do, and then discharged him, the plaintiff, therefrom, and had from that time continually wholly *neglect-
 *46] ed and refused to retain or employ the plaintiff in his said service;

and that, by means thereof, he, the plaintiff, had lost and had been deprived of all the salary, profits, and advantages which he otherwise might and would have derived and acquired from being continued in the said service of the defendant for the said term of two years; and the plaintiff had been and was, by means of the premises, still wholly unemployed.

The declaration also contained a count for wages, commission, &c., and a count upon an account stated.

The defendant pleaded non assumpsit to the whole declaration, and several pleas to the first count. To the second count, he pleaded (sixthly), that the plaintiff was not ready and willing to continue in the defendant's service; and (seventhly), that, after the making of the promise in the second count mentioned, and after the expiration of the said space of six calendar months, he, the defendant, did take and retain the plaintiff in his service and employment, as clerk, as in that count alleged; that, whilst the plaintiff was in such service and employ of the defendant, and before the discharge of the plaintiff from the service and employ of him, the defendant, as in the second count mentioned, to wit, on, &c., and on divers other days and times between that day and the day when the plaintiff was so discharged as in the second count alleged, the plaintiff, in the course of his said service and employment as such clerk of the defendant, wrongfully, improperly, and wilfully made divers wrongful and improper payments with moneys of the defendant, and the plaintiff then also appropriated to his own use divers sums of money belonging to the defendant, amounting to a large sum, to wit, to the sum of 100*l.*, which said several sums of money were received by the plaintiff from the defendant for and on account of the defendant, and which several [*47] *sums of money the defendant then ordered the plaintiff to use in the carrying on of the business of the said defendant, but which said moneys the plaintiff neglected and refused to use in manner and for the purpose above mentioned, and wrongfully and improperly misappropriated in discharge of salary or wages alleged to be due from the defendant to him, the said plaintiff; that the plaintiff misbehaved and misconducted himself in the said service and employ of the defendant, in this, to wit, that the plaintiff refused to obey an order of the defendant to the said plaintiff, as clerk to him, the defendant, to use and dispose of certain moneys given by him to the plaintiff for and on account of the business of the defendant, but which said moneys the plaintiff wrongfully and improperly misappropriated in discharge of salary or wages alleged to be due from the defendant to him the said plaintiff, and which said moneys the plaintiff refused to use in the manner directed, although requested by the defendant so to do; and that thereupon the defendant, when and so soon as he discovered the premises aforesaid, to wit, on the 1st of August, 1847, refused to suffer or permit the plaintiff to continue any longer in his, the defendant's, service and employ, and discharged the plaintiff therefrom, and from thence hitherto refused to retain or continue

the plaintiff in his, the defendant's, service and employ, as it was lawful for him to do for the cause in that plea alleged,—verification.

There were also a plea of set-off and a plea of payment, to the common counts.

The plaintiff replied *de injuria* to the seventh plea, and joined issue on all the other pleas.

The cause was tried before V. WILLIAMS, J., at the second sitting in Trinity term, 1848. The plaintiff put in two agreements,—under the first of which he had been engaged by the defendant for six months certain, *at a salary of 60*l.*,—and the second being that stated in *48] the second count; that, in pursuance of that agreement, on the 28th of September, 1846, he proceeded to Southampton, where he hired and furnished a house, and continued to conduct the defendant's agency business down to the month of August, 1847, when he was dismissed, as hereinafter mentioned; that his duty principally was, the clearing of the baggage of steamboat passengers, the payment of freight, dock-dues, portorage, and the like; that, during the period of his service, he was at times very inadequately supplied by the defendant with the funds necessary to conduct that description of business; and that, in May, 1847, there was a balance of 5*l.* 12*s.* 6*d.* due to him in respect of salary for the half year ending on the 28th of March, preceding.

Several letters which had passed between the parties were put in: of these, the most material were the following:—

“Southampton, June 5, 1847.

“Dear Sir,—I regret you should be annoyed at my retaining cash, at the end of May, due to me for salary in March last. I have difficulty in procuring money from you to meet the demands of the business; and, with larger funds, I could seek for more agency. I trust you will endeavour to keep me better supplied. Yours, &c.,

“THOMAS SMITH.”

“London, June 7, 1847.

“Dear Sir,—In reply to yours of the 5th, I must state that it is my wish that all transactions shall be conducted without misunderstanding on either side. I therefore expect you to apply all moneys remitted by me, to the purposes for which they are remitted.

“Yours, &c., HENRY THOMPSON.”

*“Southampton, July 25, 1847.

*49] “Dear Sir,—I hand you a memorandum of cash required:—

“Cigars (Mackay)	-	-	-	-	18	2	11
“Freight (Dunlop)	-	-	-	-	27	18	2
“Dock company and railway company	-	-	-	-	63	18	7
“Stationery, &c.	-	-	-	-	8	6	9
“T. Smith, as written for some days since	-	-	-	-	30	0	0

£148 6 5

"I shall be much obliged by a remittance, on my account, of 30*l.*, by return of post, as I wrote you I required the same by last Wednesday; to which I have received no reply. Yours, &c. THOMAS SMITH."

"Southampton, August 4, 1847.

"Dear Sir,—I shipped only one package by the Pacha. The West India packet is in the river, and we get no goods delivered till the owing freight is paid to Mr. Dunlop. I shall discontinue writing you for cash, as I do not even get any reply to my letters of nearly a month back. Yours, &c. THOMAS SMITH."

"London, August 5, 1847.

"Dear Sir,—Enclosed is 100*l.* for business purposes. I shall be glad to hear of its safe arrival; also bills of lading for cigars to London Docks, as usual. I enclose a memorandum, which please attend to, and send up word about it. Yours, &c.

"H. GUNTHORPE, for Mr. H. THOMPSON."

"Southampton, August 6, 1847.

"Dear Sir,—The 100*l.* safe to hand this morning. I have paid Dunlop, and have placed 30*l.* to my *account, for balance of salary due to me on the 24th of July last. The other matters shall be duly [*50 attended to. Yours, &c. THOMAS SMITH."

"London, August 7, 1847.

"Sir,—I am much surprised at the receipt of your letter this morning, finding that you have placed 30*l.* to your own account, out of the 100*l.* sent down specifically *for business purposes*. I beg, therefore, you will immediately replace it, and expend it as originally ordered by me, *for business purposes*, and shall expect to hear that such is the case by Tuesday morning. Yours, &c. HENRY THOMPSON."

"Southampton, August 8, 1847.

"Dear Sir,—I beg to state that I consider I have complied with your order as to the application of the 100*l.* sent me for business purposes; particularly as my salary has been due some time, and surely must come under the head of 'business purposes.' With every respect, yours, &c. "THOMAS SMITH."

"London, August 9, 1847.

"Sir,—As you have not complied with my orders, I have not any further occasion for your services, and will send some person down to take charge of my office, &c., immediately. Yours, &c.

"HENRY THOMPSON."

It also appeared, that, upon the plaintiff's father-in-law calling on the defendant, and asking him why he had dismissed the plaintiff from his employ, he assigned as his reason the misappropriation of the 30*l.* towards payment of his salary, out of the 100*l.* remitted on the 5th of August, expressly *for business purposes*.

*51] *On the part of the defendant, it was insisted that the plea justifying the dismissal was fully sustained by the evidence; for, that, to warrant the defendant in putting an end to the contract, it was enough to show that the plaintiff had been guilty of a wilful disobedience of a lawful command; and that it was not necessary to show that there had been any fraudulent conduct,—any moral obliquity, pecuniary or otherwise. *Callo v. Brouncker*, 4 C. & P. 518, and *Turner v. Mason*, 14 M. & W. 112, were referred to.

The learned judge left it to the jury, in the terms of the seventh plea, to say, whether the plaintiff had been guilty of any wrongful or improper misappropriation of moneys intrusted to him by the defendant, or of any wrongful or improper disobedience of orders with regard to the disposal of the money: telling them, that, if they should affirm either of those propositions, they must find for the defendant; otherwise, for the plaintiff.

The jury returned a verdict for the plaintiff, damages 185*l.* 12*s.* 6*d.*, being twelve months' salary, and twelve months' share of profits.

Murphy, Serjt., in the course of the same term, obtained a rule nisi for a new trial, on the grounds of misdirection, that the damages were excessive, that the computation of damages had proceeded upon an erroneous principle, and that the verdict was against the evidence.

Byles, Serjt., and *E. James*, now showed cause. There clearly was no misdirection in this case. Salary was due to the plaintiff; his employer knew it, and had been urged to pay it. He remits money to his *52] clerk, with a general intimation that it is remitted for "business purposes:" and it was for the jury to say whether the plaintiff was not justified in thinking that he was obeying that direction when he appropriated a portion of it in discharge of salary. [WILDE, C. J. It must be borne in mind that there had previously been a complaint of a similar appropriation.] The whole matter was before the jury. [MAULE, J. Did it appear that the employer had sustained any injury or inconvenience from the plaintiff's mode of dealing with the money? Was anything left unpaid in consequence, that was pressing?] There was no evidence that there was. The matter was properly submitted to the jury: and there is no pretence for quarrelling with the way in which they have dealt with it. [CRESSWELL, J. It was for the jury to say whether or not there was a wilful misappropriation of the money; and for the judge to say whether such a misappropriation, when proved, would justify the plaintiff's discharge.]

Murphy, Serjt., and *Pitt Taylor*, in support of the rule. The principle of law which governs cases of this description, is well laid down by PARKE, B., in *Callo v. Brouncker*, 4 C. & P. 518, where that learned judge ruled, that, to justify a master in dismissing a yearly servant before the expiration of the year, there must be, on the part of the servant, either moral misconduct, pecuniary or otherwise, wilful disobedience, or

habitual neglect. That doctrine is confirmed by *Turner v. Mason*. That was an action of assumpsit for the wrongful dismissal of a domestic servant, without a month's notice, or payment of a month's wages. The defendant pleaded, that the plaintiff requested him to give her leave to absent herself from his service during the night, that he refused such leave, and forbade her from so absenting herself, and that, against his will, she nevertheless *absented herself for the night, and until the following day, whereupon he discharged her. To this plea the plaintiff replied, that, when she requested the plaintiff to give her leave to absent herself from his service, her mother had been seized with sudden and violent sickness, and was in imminent danger of death, and, believing herself likely to die, requested the plaintiff to visit her, to see her before her death, whereupon the plaintiff requested the defendant to give her leave to absent herself for that purpose, she not being likely thereby to cause any injury or hindrance to his domestic affairs, and not intending to be thereby guilty of any improper omission or unreasonable delay of her duties; and, because the defendant wrongfully and unjustly forbade her from so absenting herself for the purpose of visiting her mother, &c., she left his house and service, and absented herself for that purpose for the time mentioned in the plea, the same being a reasonable time in that behalf, and she not causing thereby any hindrance to his domestic affairs, nor being thereby guilty of any improper omission or unreasonable delay of her duties, as she lawfully might, &c. It was held, on demurrer, that the plea was good, as showing a dismissal for disobedience to a lawful order of the master; and that the replication was bad, as showing no sufficient excuse for such disobedience. "The contract," says PARKE, B., "between the master and a domestic servant, is a contract to serve for a year, the service to be determined by a month's warning, or by payment of a month's wages; subject to the implied condition, that the servant will obey all lawful orders of the master. It was laid down by Lord ELLENBOROUGH, in *Spain v. Arnott*, 2 Stark. N. P. C. 256, and by me in *Callo v. Brouncker*, and confirmed by the Court of Queen's Bench in *Amor v. Fearon*, 9 Ad. & E. 548, 1 P. & D. 398, that the wilful disobedience of any lawful order of the master is a good cause of discharge. Here, the plea discloses a perfectly lawful order, viz. that the plaintiff should not absent herself from the service during a night, and the plaintiff's disobedience thereto. Then the question is, whether the replication discloses sufficient ground of excuse for such disobedience. *Prima facie*, the master is to regulate the times when his servant is to go out from and return to his house. Even if the replication showed that he had notice of the cause of her request to absent herself, I do not think it would be sufficient to justify her in disobedience to his order: there is not any imperative obligation on a daughter to visit her mother under such circumstances, although it may be unkind and uncharitable not to permit her." And ALDERSON, B.,

said: "The plea is a good answer to the action, because it shows the discharge of the plaintiff to have been for wilful disobedience of the defendant's order to stay in his house all night. Then, is the replication a good answer to the plea? It is informal, because it does not show that the mother was likely to die that night, or that it was necessary to go that night to see her, or to stay all night. But, if this were otherwise, these circumstances would amount only to a mere moral duty, and do not show any legal right. We are to decide according to the legal obligations of parties. Where is the decision founded upon mere moral obligation to stop? What degree of sickness, what nearness of relationship, is to be sufficient? It is the safest way, therefore, to adhere to the legal obligations arising out of the contract between the parties." Here, the learned judge, in effect, told the jury that the language of the seventh plea required the defendant to make out that the act *55] *complained of, was an act of moral turpitude. That clearly was wrong: he should have told them, in accordance with the authorities above cited, that the mere disobedience of a lawful order was a justification for the dismissal. [MAULE, J. I do not so clearly see that the judge ought to have done as suggested. You admit, that, to justify his dismissal, it was necessary to show that the plaintiff intended to disobey a lawful command of his master.] The learned judge should have told the jury, that, to sustain the plea, it was not necessary that the conduct of the plaintiff should have been morally wrong: and he altogether omitted to call the attention of the jury to that part of the plea which charged wilful disobedience of orders. What did the jury understand by "wrongful and improper?" In their minds, it could refer to no other than moral delinquency. The summing up mixes up two matters which were in their nature essentially distinct,—the one, a wrongful misappropriation of the money,—the other, a wilful disobedience of orders: the former, being a moral offence, amounting to embezzlement; the latter, though equally a ground for dismissal, scarcely amounting to a breach of morality: *Spain v. Arnott*. It was the duty of the judge to take upon himself the construction of the correspondence, and to say what was meant and understood by the parties by the words "for business purposes." He ought not to have left that to the jury. The rule upon this subject is thus laid down by PARKE, B., in *Neilson v. Harford*, 8 M. & W. 806, 828: "The construction of all written instruments belongs to the court alone, whose duty it is to construe all such instruments, as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury: and it is *the duty of the jury to take the construction *56] from the court, either absolutely, if there be no words to be construed as words of art, or phrases used in commerce, and no surrounding circumstances to be ascertained; or conditionally, when those words or circumstances are necessarily referred to them. Unless this were so,

there would be no certainty in the law; for, a misconstruction by the court is the proper subject, by means of a bill of exceptions, of redress in a court of error; but a misconstruction by the jury cannot be set right at all effectually."

It was further contended that the damages were excessive, and that the verdict was not warranted by the evidence.

WILDE, C. J. This is a rule by which the defendant seeks to set aside the verdict found for the plaintiff, and to have a new trial,—first, on the ground of misdirection,—secondly, that the verdict was against the evidence,—thirdly, that the damages were excessive, and were estimated upon an erroneous principle.

1. The misdirection is charged in two respects; first, that the learned judge improperly left to the jury the construction of certain letters, whereas he ought himself to have interpreted them, and told the jury their effect; secondly, that he presented the wrong question to the jury upon the issue raised on the seventh plea. It does not appear to me that the present case is at all affected by the authorities which have been referred to. There is no question here whether a servant may with impunity disobey the lawful orders of his master: the question is simply one of fact, whether the plaintiff did, in the terms of the seventh plea, wilfully disobey his employer's lawful orders. The plea in substance charges the plaintiff with having, in disobedience of his employer's orders, wrongfully and improperly *misappropriated in discharge of salary alleged to be [*57 due to himself, moneys which had been specifically remitted to him for other purposes. In the course of the cause, it had been contended on the part of the plaintiff that the evidence did not sustain the plea, for that the reasonable construction of the plaintiff's orders warranted the appropriation of the money that was made by the plaintiff. On the other hand, it was insisted, for the defendant, that the directions given to the plaintiff with regard to the application of the remittance, were so plain and distinct, that a departure from them must of necessity amount to wilful disobedience. Such were the views presented by the counsel on the one side and on the other; each urging that which he conceived best calculated to advance the interests of his client. Now, undoubtedly, there may be cases where it is the duty of the judge to present the points to the jury under an aspect different from that assumed by the counsel: but, ordinarily, I apprehend he does right in putting the case as the parties themselves have put it. Here, the learned judge did so. He told the jury to look at the letter of the 5th of August, and to say whether, regard being had to all the circumstances, and the nature of the dealings between the parties, the "business purposes" to which the plaintiff was directed to apply the 100*l.*, were necessarily such as to exclude the salary due to the plaintiff. It is clear that the letter itself would not enable any one to determine that. Nobody would doubt that such an expression would warrant the application of the money to the

payment of any charge on the business. In ascertaining the net profits of a business, the salary of a clerk necessarily forms an item in the sum deducted as expenses of the business. It is the defendant, therefore, who in this case requires you to look de hors the letter, for the purpose of ascertaining the true meaning of his directions: he insists, that, as *58] between himself and the plaintiff, and with reference to the course of dealing between them, the words "for business purposes" have a more limited and restricted meaning, and were meant to exclude salary. The case is, therefore, taken out of the ordinary rule, that the construction of written documents is for the court, and not for the jury. The question was, what was the plaintiff warranted in understanding to be the meaning of that letter: and, how was that to be determined, but by looking at the letter, in connexion with all the surrounding circumstances? The learned judge, in effect, left it to the jury to say whether the construction put upon the letter by the plaintiff, was justified by its language; or whether, as the defendant contended, the language was so plain and unambiguous that the plaintiff must be taken to have been guilty of a wilful disobedience of orders. I apprehend that was the proper question to leave to the jury. It has been urged that the learned judge erred in leaving it to the jury to say, whether the application of the funds intrusted to the plaintiff was wrongful and improper, in such a way as to induce the jury to suppose, that, to support the plea, there must of necessity be some moral delinquency in the plaintiff. I do not, however, so understand the direction. Taking the whole of it together, and construing it in a fair spirit, coupled with the arguments that had been urged by counsel before the jury, they could not possibly have been misled by it. It is to be observed that there is no plea alleging simply a disobedience of lawful orders: the charge is of a *wrongful and improper* disobedience of orders: the question left to the jury was, whether the disobedience was wrongful, in the sense of being intentional. For these reasons, I think the first ground of the motion fails.

2. The next ground is, that the verdict was against evidence. In answer to this, it is enough to say that *there was evidence on *59] both sides, that the whole was fairly submitted to the jury, and that the learned judge does not report to us that he was dissatisfied with the verdict; and, although I am free to confess that I should have come to a different conclusion had I been upon the jury, I cannot say that the verdict is so entirely wrong as to justify me in saying that the matter ought to undergo another investigation.

3. With respect to the amount of damages, I cannot discover any erroneous computation of figures. It was for the jury to say what amount of compensation the plaintiff was entitled to for the defendant's breach of contract. Upon this point also I am of opinion that the defendant has failed to establish any ground for making the rule absolute.

MAULE, J. I also think this rule should be discharged. The alleged misdirection is two-fold. In the first place, it is said that the judge improperly left to the jury the construction of a written document, viz., a letter addressed by the defendant to the plaintiff, his clerk, whereby he directed him to apply a sum of 100*l.* remitted to him therein "for business purposes." I agree, that, generally speaking, the construction of a written contract is for the court: but, when it is shown by extrinsic evidence, that the terms of the contract are ambiguous, evidence is admissible to explain the ambiguity, and to show what the parties really meant. That is one of Lord Bacon's maxims. Where there is an election between two meanings, it is properly a question for the jury. So, if a man devise land to his "cousin John," and it appears that he has two cousins named John, extrinsic evidence is admissible to show to which of them he meant the land to go. If the letter of the 5th of August is to be construed by what appears within the four corners of it, the direction to *apply the money remitted to "business purposes," clearly would [*60 not exclude the application of a portion of it to the payment of the clerk's salary. But I agree that it was competent to the defendant to show by extrinsic evidence, what orders had been previously given. I think the defendant was quite right in saying that "business purposes" might bear a restricted sense, and mean business purposes exclusive of clerk's salary. That duplicity of sense is the very foundation of the defendant's view of the case. The ambiguity, being introduced by extrinsic evidence, may be explained by evidence. The letter of the 5th of August was in answer to two very pressing applications for money, one of them describing the purposes for which it was required,—amongst others, the identical sum in question, 80*l.*, for salary due to the plaintiff: and I am very far from saying that the plaintiff was wrong in concluding that he might fairly apply a portion of the remittance in discharge of his own claim. The general replication *de injuriâ*, puts in issue each of the several matters that are materially alleged in the seventh plea. The only material matter in the plea, that has been relied on as a defence to the action, is, that the plaintiff, in the course of his service and employment as such clerk of the defendant, wrongfully, improperly, and wilfully made divers wrongful and improper payments with moneys of the defendant, and then also appropriated to his own use divers sums of money belonging to the defendant, amounting to a large sum, to wit, 100*l.*, which said several sums of money were received by the plaintiff from the defendant for and on account of the defendant, and which several sums of money the defendant then ordered the plaintiff to use in the carrying on of the business of the defendant, but which said moneys the plaintiff neglected and refused to use in manner and for the purpose above mentioned, *and wrongfully and improperly misappropriated in dis- [*61 charge of salary or wages alleged to be due from the defendant to him the plaintiff. Suppose, instead of that being put in issue by *de in-*

jurid, the allegation had been traversed in terms, there can be no doubt that it would have been the duty of the judge to leave the issue in those very terms to the jury. It was necessary to leave it to the jury to say whether the conduct of the plaintiff had been wrongful and improper; and it was necessary also to explain to them the sense in which those expressions were used: and I think the jury might most correctly and properly come to the conclusion that they involved a charge of something more than mere disobedience of orders. On the part of the defendant, it had been insisted the plaintiff's appropriation of the money was wrongful and improper, inasmuch as it was a wilful disobedience of the injunctions given to him by the letter. The plaintiff, on the other hand, contended that the direction in the letter was not such that he was bound to understand it in the sense insisted on by the defendant, viz. as excluding the application of any portion of the money in discharge of his own salary. The wrong and impropriety, therefore, were left to the jury precisely in the sense in which they were understood by the parties: and it seems to me that the proper instruction was given to them, to guide them to a proper consideration and a right conclusion of the true question at issue. I therefore think the first and main ground upon which this rule was obtained, is answered.

2. As to the verdict being against evidence, I feel even more difficulty than the lord chief justice feels; for, I am unable to see that the conclusion the jury came to was wrong.

*62] 3. I also think there is no ground for saying that *the damages were miscomputed. It must be born in mind that embezzlement was imputed to the plaintiff.

CRESSWELL, J. I also am of opinion that the rule in this case should be discharged. It appears to me that the learned Judge did not, as it is suggested he did, leave to the jury the construction of the letter of the 5th of August, treating it as a written instrument. There was a latent ambiguity in the letter, which was shown by extrinsic evidence, and which it was therefore competent to explain by evidence. The learned judge appears to have left it to the jury to say what was the sense in which the parties had used the expression "for business purposes," in that letter,—pointing their attention to the arguments that had been urged on the one side and on the other. The defendant's counsel had insisted that the plaintiff was bound to understand the expression as excluding the application of any portion of the remittance to the payment of arrears of salary: the plaintiff's counsel, on the other hand, insisted that payment of salary was fairly and legitimately a business purpose. My brother *Murphy*, when he moved for the rule, seems to have understood the learned judge to have told the jury, that, to satisfy the words "wrongfully, improperly, and wilfully," it was necessary that the plaintiff should have been guilty of an act of moral turpitude; whereas, he insisted, the dismissal was justified, if the plaintiff had been guilty of any wilful dis-

obedience of a lawful order. Now, the word "wilful" does not occur in that part of the seventh plea; neither does it in the note of my brother WILLIAMS of the way in which he left the question: and I have looked through the short-hand notes of the summing up, and I do not find the word used even there. The plea states that the plaintiff refused to obey an order of the defendant to the plaintiff to dispose of certain moneys given by *him to the plaintiff for and on account of the business of [63 the defendant, but which moneys the plaintiff wrongfully and improperly misappropriated in discharge of salary alleged to be due to the plaintiff. The substance of the issue was, whether the plaintiff wilfully disobeyed orders in that respect. The words must be taken to have been used in the same sense in the summing up as in the plea. I therefore think the direction was right.

Upon the other points, I concur with the lord chief justice and my brother MAULE.

V. WILLIAMS, J., concurred.

Rule discharged.

LLOYD v. HARRIS. June 11.

To constitute a proper service of an award, a copy must be delivered to the party, and the original must, at the same time, be shown to him.

Where the copy was personally delivered to the party on the 21st of October, and a demand of performance made on the 23d, the original being then for the first time shown:—Held, that this was not such a service as to form the foundation either of an attachment or of a rule under the 1 & 2 Vict. c. 110, s. 18.(a)

IN this case a verdict was taken for the plaintiff, by consent, damages 500*l.*, subject to the award of a barrister, to whom were referred the cause and all matters in difference between the parties; and the order contained a direction "that the contract of purchase between the parties be completed forthwith, and the purchase-money be brought into court to abide the event of the arbitration;" the costs of the cause to abide the event of the award, and the costs of the reference to be in the arbitrator's discretion.

On the 10th of June, 1848, the following order was made by COLTMAN, J.: "Upon hearing the attorneys *or agents for the plaintiff, and [64 the defendant in person, and by consent, I do order, that, notwithstanding the terms in the order of nisi prius of the 29th of February, 1848, that the contract of purchase between the parties be completed forthwith, and the purchase-money be brought into court to abide the event of this arbitration, the arbitrator shall have power and authority to direct what shall and ought to be done by either party as to carrying out the said contract of purchase of leasehold property at Hayes, referred

(a) As to rules under this statute, *vide post*, 74 (a).

to in the said original order, and as to the purchase-money for the same being brought into court, either wholly or in part; and the arbitrator shall have power, in every respect, to award and direct what shall be done between the parties, relating to the matters referred to him, except that the costs of the cause shall abide the event, as provided for in the said original order."

The arbitrator made his award on the 30th of September, 1848. After reciting the order of nisi prius, and the order of COLTMAN, J., of the 10th of June, 1848, the award proceeded as follows:—"And whereas a certain other action was commenced on the 8th of January now last past, in the said court of Common Pleas, in which the said H. G. Harris was the plaintiff, and the said John Lloyd was the defendant, and certain issues were, on or about the 8th of February now last past, joined therein between the said parties: And whereas a certain agreement was entered into on the 15th of October, 1847, between the said John Lloyd of the one part, and the said H. G. Harris of the other part, in the words following, that is to say—
'The said John Lloyd agrees to purchase at the price to be fixed as hereinafter mentioned, and the said H. G. Harris to sell to him (subject to the mortgage of 700*l.* now charged thereon in favour of P. C. J. Smith), all those two leasehold messuages or dwelling-houses, situate at Hayes,
*65] in the county of Middlesex, and known as Alpha Villas; and also that piece of leasehold meadow land adjoining the said two messuages, containing three acres and three quarters, or thereabouts; and it is agreed that the said premises shall be forthwith valued by a competent surveyor, to be fixed upon by the said parties, and that his valuation shall be the price (subject to reduction by the amount of the said mortgage) to be paid and received by the said parties respectively, as the purchase-money of the said premises; the said purchase to be completed with all convenient speed after such valuation; and the said H. G. Harris is to take, in part payment of the said purchase-money, warrants for three pipes of port wine, and for seven butts of sherry, clear of all charges (duty excepted), at prices to be respectively fixed by a competent wine-broker to be selected by the said parties; the expense of both the said valuations to be borne by the said parties equally, and the expenses of the perfecting of Mr. Harris's title, and of this agreement, and conveyance, to be borne by the said parties in the following proportions—two-thirds to be paid by the said John Lloyd, and the remaining one-third by the said H. G. Harris: And whereas the said premises were valued by a competent surveyor, in pursuance of the said agreement, at the sum of 1575*l.*: And whereas the said parties have, in the course of the said arbitration before me, dispensed with the stipulation that part of the said purchase-money should consist of certain wine-warrants, and have agreed, in consideration thereof, that the value of the said premises should be considered and taken to be 1527*l.*, instead of the above-mentioned sum of 1575*l.*: And whereas a certain other

agreement was also entered into on the said 15th of October, 1847, between the said John Lloyd, of the one part, and the said H. G. Harris, of the other part, by which agreement, &c. &c.: And whereas, by indenture bearing date *the 27th of September, 1845, a term of twenty-one years was granted by one Thomas Pitts to the said H. G. [*66 Harris, in certain premises situate at Chiswick, in the county of Middlesex; and whereas the said indenture was deposited by the said H. G. Harris with the said John Lloyd, some time in the year 1847, as a collateral security for a certain loan of money; and whereas the said indenture cannot now be found, and it is uncertain whether the same is wholly lost or not: And whereas there are certain other matters in difference between the said parties, which were brought under my consideration, but which it is not necessary to particularize: Now, I, the said arbitrator, &c., do make and publish this my award in writing of and concerning the premises, that is to say, I do award and direct, with respect to the first-mentioned action, in which the said John Lloyd was plaintiff, and the said H. G. Harris defendant, that the verdict entered for the plaintiff, damages 500*l.*, be set aside, and that, instead thereof, a verdict be entered for the plaintiff upon the issues raised by the first, second, third, fourth, sixth, seventh, tenth, eleventh, and thirteenth pleas, and so much of the twelfth plea (non assumpsit) as is pleaded to the fourth count of the declaration in the said cause, and for the defendant on the issues raised by the fifth, eighth, ninth, and fourteenth pleas, and so much of the twelfth plea as is pleaded to the fifth and sixth counts of the declaration: With respect to the action secondly above mentioned, in which the said H. G. Harris was plaintiff, and the said John Lloyd was defendant, I do find and award for the plaintiff on the issues raised by the first and second pleas, and for the defendant on the issue raised by the third plea; and I do award and direct that each party shall bear and sustain his own costs of and concerning the said action: With respect to the agreement of the *15th of October, 1847, first above mentioned, I award and direct that the said John Lloyd shall pay to the said H. G. Harris, on [*67 the 23d of October next, the sum of 785*l.* as the price and value of all the interest of the said H. G. Harris in the property at Hayes, and that a conveyance of all such interest, shall be prepared by the said John Lloyd, and executed by the said H. G. Harris at the time of the payment by the said John Lloyd of the said sum of 785*l.*; and I further award and direct, that the expenses, if any, of perfecting the title of the said H. G. Harris, and the expenses of the said agreement of purchase, and of and concerning and in any way relating to the conveyance above directed, shall be taxed and ascertained by one of the taxing masters in Chancery, and that, after such taxation, the amount of costs in relation hereto, of each solicitor for the said parties respectively, shall be added together, and make a gross sum, and that two-thirds of such gross sum shall be paid, borne, and sustained by the said John Lloyd, and the remaining

one-third by the said H. G. Harris:" [The award then provided for payment of arrears of interest on the mortgage referred to in the agreement of the 15th of October, 1847, and of the expenses of the surveyor's valuation: it then proceeded as follows:—“With respect to the indenture bearing date the 27th of September, 1845, for a term of years in certain premises at Chiswick aforesaid, I do find and assess the value of such indenture to the said H. G. Harris at the sum of 360*l.*; and I do award and direct that the said John Lloyd shall pay that sum to the said H. G. Harris on the 23d of January, 1849, unless in the mean time he can obtain from the said Thomas Pitts a fresh or duplicate indenture granting to the said H. G. Harris the same term of years from the said 27th of September, 1845, and containing in every respect the same covenants as were contained in the said original indenture, in which case he is to deliver such fresh or duplicate indenture to the said H. G. Harris, and the said H. G. Harris shall receive the same in substitution for the one now supposed to be lost, and, on so receiving such fresh or duplicate indenture, the said H. G. Harris shall not be entitled to receive the said sum of 360*l.*, or any part thereof; and I do award and direct that all expenses whatsoever in any manner relating to the obtaining and executing of such fresh or duplicate indenture, shall be borne and defrayed by the said John Lloyd alone: And, with respect to the said second agreement of the 15th of October, 1847, relating to the carrying on of the wine trade, and with respect to all other matters in difference between the said parties, of every kind soever, save and except those hereinbefore specified, I do award and direct that the said John Lloyd shall pay to the said H. G. Harris, on the said 23d of January, 1849, the sum of 152*l.* 15*s.*: And I do award and direct,—save and except as hereinbefore awarded and directed,—that each party shall bear and sustain his own costs of the said reference, but that the costs of this my award shall be wholly borne and sustained by the said John Lloyd: And I do finally award and direct, that, after payment of the several sums hereinbefore directed to be paid, and the costs aforesaid, each of the said parties, if required so to do, shall, at the costs and charges of the other of them, execute to the other of them, a release of the matters so referred to me as aforesaid. In witness," &c.]

Lloyd was personally served with a *copy* of the award on the 21st of October, 1848, the original not being at that time shown to him; and, on the 23d, the 785*l.*, and 77*l.* 16*s.* 6*d.*, the costs of the award, were personally demanded of him by Harris, and notice given to him that Harris was ready to execute a conveyance of the leasehold premises at Hayes, mentioned in the agreement of the 15th of October, 1847; and the original award was then for the first time shown to him. *But the order of reference and the order of COLTMAN, J., were not made a rule of court until the 6th of November.*

On the 23d of January, 1849, Harris called at the residence, and also

at the place of business, of Lloyd, for the purpose of demanding the 512*l.* 15*s.* directed to be paid on that day, but was informed by a servant of Lloyd that he was not in town. And, on the 14th of May, 1849, Lloyd was duly served with a copy of the rule of court, and the 512*l.* 15*s.* was then demanded of him personally.

Upon an affidavit of the above facts, and also stating that no portion of the money directed by the award to be paid by Lloyd, or the costs of the award, had been received by Harris, or by any other person on his behalf, and that no deed of conveyance of the leasehold property at Hayes had been tendered to Harris for execution, and that no fresh or duplicate lease of the premises at Chiswick had been offered to him,

Channell, Serjt., on behalf of Harris, moved for a rule (under the 1 & 2 Vict. c. 110, s. 18), calling upon Lloyd to show cause why he should not forthwith pay to Harris the several sums directed by the award to be paid. He submitted, that, although there might be some difficulty as to the 785*l.*, the award not being, *simpliciter*, for the payment of that sum, (a) there could be none as to the two sums of 360*l.* and 152*l.* 15*s.* [*MAULE, J.* When the 785*l.* was demanded, the orders had not been made a rule of court, therefore the party did not go properly armed to make a demand; and, *when the two last-mentioned sums were demanded, [*70 there was no due service of the award.] At the time the 512*l.* 15*s.* was demanded, Lloyd had been duly served with the award and rule of court. It is not necessary, in order to obtain a rule under this statute, that the party to whom the money is directed to be paid, should be strictly in a position to move for an attachment. [*WILDE, C. J.* It certainly seems odd to say that you shall have all the difficulties in the way of obtaining a remedy against the goods, which you had when the remedy was sought against the person of the debtor.]

A rule nisi having been granted as to the 360*l.* and 152*l.* 15*s.* only,

Byles, Serjt., now showed cause. Since the case of *Jones v. Williams*, 11 Ad. & E. 175, 4 P. D. 217, no doubt, the courts will make rules for the payment of money under an award, to enable the party to avail himself of the 18th section of the 1 & 2 Vict. c. 110, where the award is for the payment of a specific sum absolutely and unconditionally, and the party has been duly served with the award and rule of court. But the statute does not apply where, as here, the court would have to try upon affidavit the performance or non-performance of an alternative condition: nor is there any authority for severing an award in the manner here proposed. What would be the party's remedy for the rest? an attachment? or an action on the award? To entitle himself to a rule under this act, it has repeatedly been held, that the party to whom the money is directed to be paid, must be as regular in all respects as if he were moving for an attachment: *Neale v. Postlethwaite*, 1 Q. B. 243, 4 P. & D. 623; *Abra-*

(a) Vide *Graham v. Darcey*, 6 Man. Gr. & S. 537.

*71] *hams v. *Taunton*, 1 D. & L. 319; *Wilson v. Foster*, 6 M. & G. 149, 6 Scott, N. R. 936, 1 D. & L. 496; *Hawkins v. Benton*, 2 D. & L. 465. The party called upon to pay, should be served with a copy of the award, the original being at the same time shown to him, when the money is demanded of him: *The King v. The Inhabitants of Alnwick*, 5 B. & Ald. 184; *Pearson v. Archbold*, 11 M. & W. 108, 477. That was not done here. [*Channell*, Serjt. He had been previously served with a copy of the award. MAULE, J. That is like serving a man with a copy of a writ on one day, and offering to show him the original upon a subsequent day.]

Channell, Serjt., in support of his rule. The doctrine of the court of Queen's Bench in *Jones v. Williams* has since been followed in numerous cases. In *Doe v. Amey*, 8 M. & W. 565, 1 Dowl. N. S. 23, Lord ABINGER, C. B., says (1 Dowl. N. S. 23): "The rule laid down by Lord DENMAN in *Jones v. Williams* is a sound one; the practice in this respect depends on the general jurisdiction of the court, and the form in which the court shall order obedience, must depend upon its discretion. Formerly, the practice was, to order the party to perform the award: in that case, the sum of money to be paid was not mentioned in the rule, and, consequently, according to the decision of the court of Queen's Bench, in which I entirely concur, was not a rule or order upon which execution could issue, within the meaning of the act; but the substance is the same, for, if the court could order a party to perform an award which directed him to pay a certain sum, it could, in a more direct way, order him to pay that sum." And the courts have repeatedly decided, that the formalities required on moving for an *attachment may, under some

*72] circumstances, be dispensed with: *Richards v. Patterson*, 8 M. & W. 313, 1 Dowl. N. S. 52; *Jordan v. Berwick*, 9 M. & W. 3, 1 Dowl. N. S. 271; *Doe d. Moody v. Squire*, 2 Dowl. N. S. 327; *Hawkins v. Benton*, 2 Dowl. & L. 465. In *Doe d. Moody v. Squire*, WIGHTMAN, J., says: "An attachment is in the nature of a penalty against a man for not obeying that which is, in effect, the order of the court: this rule, however, is not of the same character. By this rule, it is only sought to give the award the value and effect of a judgment. It may be that an attachment will in future be unnecessary for practical purposes. I think enough is done in obtaining this rule, without going through the forms which were necessary in cases of attachment." In *Wilson v. Foster*, the main objection was, to the proposed mode of service of the rule, viz. by sticking it up in the office. [CRESSWELL, J. In *Bower, in re*, 1 B. & C. 264, it was held that personal knowledge of an award and rule of court, makes the party liable to an attachment for not performing the award, although he has not been personally served.] In *Abrahams v. Taunton*, there was no evidence that the award had come to the party's knowledge. [MAULE, J. The service of the copy and exhibiting of the original, must be contemporaneous. A man upon whom a copy is served

is not bound to keep it in his pocket until the original is shown to him.] It is enough if he has substantial information as to what is required of him.

WILDE, C. J. It is highly inexpedient that any uncertainty should exist as to the practice upon applications of this sort: at the same time, it is not easy to lay down any general rule. Without, therefore, *say-
ing how far these rules are to be considered analogous to motions [*73 for attachment, it is enough to say that there has been a clear and recognised mode of service of an award, in order to bring the party into contempt for not performing it, and which is only to be departed from under very special circumstances, viz. by personally delivering to him a copy of the award, and at the same time showing him the original. Here, a copy was served at the time when a demand was made in respect of a subject-matter totally different from that to which this rule relates. It seems to me that the award has not been well served, and that there is an entire absence of circumstances which might dispense with regular service. The rule, therefore, cannot be made absolute.

COLTMAN, J. I am of the same opinion. It is essential that there should be an intelligible and well-understood rule upon this subject: and there undoubtedly is a well-established rule; and that is, that, in the absence of special circumstances to dispense with it, there must be a personal service of the award, by delivering a copy and showing the original at the same time. That course has not been adopted here, and there are no special circumstances to justify a departure from it.

MAULE, J. This is an application for a rule of court, in order to enforce the summary remedy given by the statute 1 & 2 Vict. c. 110, s. 18, which enacts, amongst other things, that all rules of courts of common law, whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person, shall have the effect of judgments in the superior courts of common law, and the persons to whom any such moneys, or costs, charges, or expenses shall be payable, shall be *deemed judgment-creditors within the meaning of the act; and [*74 all remedies thereby given to judgment-creditors are in like manner given to persons to whom any moneys, or costs, charges, or expenses are by such orders or rules respectively directed to be paid. This practice was first introduced by a *dictum* of the Court of Queen's Bench in the case of *Jones v. Williams*; and it has since been adopted by all the courts, and may now be considered as established. (a) I think, however, that this summary remedy,—or, rather, the proceeding that leads to it,—ought not to be granted, unless the party against whom the application

(a) Further consideration, however, has at length inclined this court to take a more strict, and probably more correct, view of the statute, and to throw some doubt upon this "established practice:" for, in a recent case of *Creswick v. Harrison*, M. T. 1850 (Nov. 22), they construed the statute as merely intending to give a new and additional force to such rules and orders as the courts were already in the habit of granting, but not to authorize them to make rules which they never thought of making before.

is made, has knowingly refused to do something which he was bound by a rule of court to do. The present rule calls upon Mr. Lloyd to pay 512*l.* 15*s.*, which it is said he has been directed by an award to pay. Now, I think that both principle and justice require that a man should not be subjected to an order of this sort, unless it is made to appear that he has wilfully refused to do what the award requires of him, with full knowledge, or means of knowledge, of his liability to do it: he cannot be said to have wilfully refused to perform the award, unless he has had due notice of the award and of the rule of court, and has been properly called upon to perform it. There is but one known and established mode of giving notice of the award. If this were *res integra*, I should say the good sense of the thing requires that the party should be *75] furnished with a copy, and at the same time be shown the original. And that is the practice in all cases. In *The King v. The Inhabitants of Alnwick*, where the question was, whether an order of removal of a pauper had been well served, ABBOTT, C. J., says: "The service, in order to be valid, must be either by delivery of the order itself, or by leaving a copy of the order, and at the same time producing the original." In order to constitute a proper demand of a sum of money under an award, the party should be personally served with a copy, and should have an opportunity of satisfying himself at the time that it is a true copy, by comparing it with the original. Here, the copy was delivered on the 21st of October, no offer being then made to show the original; two days afterwards, when the money was demanded, the original was for the first time produced. That clearly is not a good service: and this is not a mere technical rule, but one that is essential to the due administration of justice. I think the party has not had that sort of notice which is essential to found a summary proceeding of this nature; and therefore I agree with the lord chief justice that this rule should be discharged.

The rest of the court concurring,

Rule discharged, with costs.

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*DUNN v. LOFTUS. June 4.

A defendant, who after issue joined obtained his discharge under the insolvent debtors acts, 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, was allowed to plead such discharge *pursuante* *darrein continuance*, without an affidavit (under Reg. Gen. Hilary term, 4 W. 4), that the matter of the plea arose within eight days next before the pleading thereof,—it being shown that the omission to plead within the prescribed time, had not arisen from any culpable conduct on his part, and had occasioned no disadvantage to the plaintiff: but (MAULE, J., *dissentiente*) the court allowed the plaintiff the costs of opposing the rule for that purpose.

ASSUMPSIT by the endorsee, against the drawer and maker respectively, of a bill of exchange for 250*l.*, and a promissory note for 300*l.*

The writ of summons was issued on the 14th of May, 1847. The declaration was delivered on the 5th of June, in the same year. The defendant having pleaded several pleas, issue was joined on the 10th of June, 1848, and notice of trial was given for the sittings after Trinity term in that year, but was afterwards countermanded.

On the 14th of December, 1848, the defendant filed a petition for relief under the insolvent debtors acts, 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, the plaintiff's claim being inserted in his schedule as disputed.

On the 9th of March, 1849, the defendant was adjudged entitled to his discharge. The claim of the plaintiff was on that occasion investigated before the commissioner, who decided that it was unfounded, the securities having been satisfied in 1844.

Under these circumstances, the defendant, under an impression that the plaintiff would not further proceed with the action, (a) omitted to plead his discharge *puis darrein continuance* within the time prescribed by the rule of court. The plaintiff, however, having, on the *10th of May last, given a fresh notice of trial for the first sitting in the present term, a summons was taken out before COLTMAN, J., at chambers, on the 18th, for leave to plead the discharge *puis darrein continuance*, without an affidavit that the matter of the plea arose within eight days next before the pleading thereof. (b) The learned judge at the hearing, on the 21st, declined to make the order. The defendant, on the 22d of May, made the cause a special jury cause, and, on the 23d,

G. S. Evans obtained a rule nisi in the terms of the summons. He cited Kibblewhite v. Reynolds, 7 Scott, 232, where the court permitted one of two defendants to plead his bankruptcy and certificate *puis darrein continuance*, without the affidavit required by the rule of court,—it appearing that the defendants had had reason to believe that the action would not be proceeded with; and this, although it did not appear whether or not the demand in respect of which the action was brought, was provable under the fiat.

Peacock now showed cause. In Snarp v. D'Almaine, 8 Dowl. P. C. 664, it was held, that, if a defendant is guilty of unreasonable delay in availing himself of his certificate, in an action for a debt barred by the certificate, the *court will not relieve him. There, an action on an annuity deed was commenced against the defendant in May, 1839. A fiat issued against him in June in that year, and he obtained his certificate in December. In July, he pleaded *non est factum*. In

(a) There were contradictory statements in the affidavits, as to the purport and effect of conversations between the managing clerks of the respective attorneys.

(b) Under the rule of Hilary term, 4 W. 4, I. 2, which provides, "that, in all cases in which a plea *puis darrein continuance* is now by law pleadable in banc, or at nisi prius, the same defence may be pleaded, with an allegation that the matter arose after the last pleading, or the issuing of the jury process, as the case may be: provided also, that no such plea shall be allowed, unless accompanied by an affidavit that the matter thereof arose within eight days next before the pleading of such plea, or unless the court or a judge shall otherwise order." See Powell v. Duncan, 5 Dowl. P. C. 550.

January following, he applied to a judge to be allowed to plead his certificate *puis darrein continuance*, and was refused. In March, he made another unsuccessful application at chambers. The plaintiff obtained a verdict at the next assizes, and afterwards signed judgment. The defendant applied to the court to stay proceedings, pursuant to the 6 Gt. 4, c. 16, s. 121, and the application was refused. COLERIDGE, J., there says: "When the statute says that the bankrupt shall be discharged, it must mean discharged according to some regular course known in the practice of the courts; the court in which the application is made, is to intervene, and the party seeking to have the benefit of the provision, must take the necessary steps at the proper time. If this be not held to, the consequence might be, that a bankrupt, obtaining his certificate before any plea pleaded, might first plead only to the merits, and, failing in this, might at any later stage apply for the summary interference of the court. This point was not made in either of the cases cited above; (a) nor is it clear, according to the facts stated, that it could have been in either: but all legal analogy shows that such a course could not be allowed. This view of the case proves what at first sight did not appear—the correctness of the answer of the lord chief justice at chambers, that this, in truth, was substantially the same application which was made to my brother PATTERSON: though varied in phrase, it is really an *79] attempt to get over the consequences of the *defendant's own laches, and to have the benefit of the statute at a later stage, and in a summary manner, which in an earlier stage the defendant might have had by a regular plea, to be tried as to the facts before a jury. I think, upon this ground, the rule ought to be discharged." Here, the defendant's conduct throughout has been so vexatious that he is not entitled to ask any indulgence at the hands of the court. (b) The plaintiff has no claim under the insolvency, her claim having been disallowed by the commissioner, whose decision she has no means of reviewing. [WILDE, C. J. Is the adjudication a bar to the action?] If pleaded, it undoubtedly is. If the defendant's case is a true one, he has a good defence to the action, independently of the discharge under the insolvent debtors acts; and no injustice will be done by discharging this rule.

Evans, in support of his rule, relied on *Kibblewhite v. Reynolds*.

WILDE, C. J. The ground of this application is, that it was thought unnecessary to plead the plea now sought to be put upon the record, at the time required by the rule of court, the defendant's attorneys conceiving that the plaintiff would not, under the circumstances, further proceed with the action, seeing that the defendant's discharge under the acts for the relief of insolvent debtors, was a complete bar. No suggestion is even now offered to the court that such discharge would not so operate.

(a) *Davis v. Shapley*, 1 B. & Ad. 54, and *Sadler v. Cleaver*, 7 Bingh. 769, 5 M. & P. 766.

(b) The affidavits in opposition to the rule showed that the plaintiff had been put to considerable expense in getting rid of an injunction to stay proceedings in the action,—defendant's bill having been dismissed with costs, which costs had never been paid by him.

The only doubt on my mind has been whether the case of *Sharp v. D'Almaine* is an *authority to show that the court will in such a case confine its attention to the strict rights of the parties, or [*80 whether it is proper to consider in each case whether the conduct of the defendant has been such as to deprive him of what is in one sense an indulgence. I have looked attentively at the case; and I must confess that it does not appear to me to be an authority at all. My brother PATTERSON at first refused the application at chambers; and, when the parties afterwards went before chief justice TINDAL, he treated it as an appeal from a single judge to a single judge, and on that ground declined to interfere: but he added an expression of opinion that the conduct of the defendant had been vexatious towards the plaintiff. Now, I cannot treat that as an authority, that, if the conduct of the defendant *had* been vexatious, that would have been ground enough for refusing to allow him to avail himself of the proposed defence. If the party comes to the court and shows that his omission to plead within the proper time was not the result of any culpable conduct on his part, and has occasioned no disadvantage to the plaintiff, I apprehend he is entitled to be let in. It seems to me that the defendant in this case had reasonable cause for not pleading his discharge within the time prescribed by the rule of court. It would have been useless for the plaintiff to go on with the action, seeing that there was a complete answer. For these reasons, I think sufficient cause has not been shown against this rule, and consequently that it must be made absolute.

The rest of the court concurred.

Peacock, for the plaintiff, submitted, that, under the circumstances, the rule ought only to be made absolute upon payment of costs.

*WILDE, C. J. I am inclined to think it reasonable that the rule should be made absolute only upon the terms of the defendant [*81 paying the costs. The party has a certain time within which to plead, as of right. It is discretionary with the court to allow him to plead after that time, upon proper grounds being laid for it. But the plaintiff has a right to come and contest the defendant's reasons for not pleading according to the strict course and practice of the court, and to take the opinion of the court thereon. Here, the parties differed as to whether or not certain conversations took place between the managing clerks of the respective attorneys, and as to what would be the effect of such conversations, with reference to the sufficiency of the defendant's excuse. Besides, the plaintiff might assume, from the *dictum* of TINDAL, C. J., in the case referred to, that it was competent to her to be heard upon that subject. I think she had a right to be heard: and I know of no case in which, a certain time being limited for an act to be done, and the court having a discretion as to allowing it to be done afterwards, the party coming to oppose the grant of such indulgence is not allowed his costs.

I therefore think this rule should be made absolute, but upon payment of costs.

COLTMAN, J. I also think the defendant must pay the penalty of his omission to avail himself at the proper time of the defence he now proposes to place upon the record. The party who has by his neglect caused the waste of money, should be made to bear the loss.

MAULE, J. I agree that the person who has caused the waste of money, should bear the loss of it. But in this case I think it is the plaintiff, and not the defendant, who has occasioned unnecessary and useless expense. The plaintiff's claim has already been inquired *82] into before a competent tribunal, and has been negatived. The defendant, therefore, had a right to anticipate, and did anticipate, that the plaintiff would not further proceed with the action. A man may very reasonably presume that another will do that which it is his interest as well as his duty to do. I therefore think it was a perfectly correct course for the defendant to abstain from incurring the expense of pleading his discharge *puis darrein continuance*, within the eight days required by the rule of court. The decision, however, to which the court is now about to come, will make it necessary for a prudent man in all such cases to incur that expense. It is said to be an invariable rule, that, if a time is limited for taking a step, and the court in its discretion sees fit to permit it to be taken at a later period, the indulgence is only granted on payment of costs by the party applying for it. But I am not aware of the existence of any such general rule: and, if there be any such, I cannot think this case falls within it. Continuances being abolished, or nearly so, it became necessary to provide for pleading *puis darrein continuance*. The rule of court requires that such a plea shall be accompanied by an affidavit that the matter thereof arose within eight days next before the pleading of such plea, unless the court or a judge shall otherwise order. That does not give the court or the judge any original power to allow the plea: but, if an order of the court or of a judge is obtained for the purpose, it is not the allowance of a favour, but a matter of right. It seems to me, that, where the matter to be pleaded affords an unquestionable answer to the action, it is the defendant's duty to obtain an order for the plea only if he finds the plaintiff is going on. And in this he is not asking anything in the nature of a favour or indulgence; he places himself in the situation of a person seeking to enforce *83] a right,—to avail himself of a perfectly legal defence, to which he is driven by the conduct of the opposite party. I think the defendant here was quite in time, and that, if the plaintiff chose to come and oppose an undeniable right, she ought not to call upon the defendant to pay her costs. I think the costs of this rule should, like the costs of an order for time to plead, and the like, be costs in the cause.

CRESSWELL, J. I think this is, in substance, an application to the indulgence of the court, to relieve the defendant from the consequence of

his omission to plead in proper time, and therefore that the defendant should pay the costs. Rule absolute, on payment of costs.

The master, in taxing the plaintiff's costs, upon the rule, allowed only the costs of opposing the motion.

June 11. *Peacock* moved for a rule to show cause why the master should not review the taxation. It appeared, that, after COLTMAN, J., had refused to make any order upon the summons of the 18th of May last, the plaintiff's attorney prepared and delivered briefs on the issues as they then stood. It was therefore submitted, that, inasmuch as, in consequence of the new plea allowed to be pleaded, the briefs would require to be altered, the costs of preparing those briefs should have been allowed as part of the costs of and occasioned by the rule. [MAULE, J. The plea is a plea in discharge. Does the plaintiff mean to go to trial?] Yes. [MAULE, J. Then, I do not think the costs now asked for should be given.]

Per Curiam,

Rule refused.

*CARPENTER and Another v. HALL. *June 2.* [*84

Obtaining time to plead (without any order or consent-summons) is a waiver of any irregularity in the rule to plead.

THE declaration in this cause was delivered on the 9th of May, with a rule to plead intituled "*Carpenter v. Hall.*" On the 14th,—the day on which the rule to plead, if correct, would have expired,—the defendant obtained from the plaintiff's attorney two days' further time to plead; and, on the 17th, no plea having been delivered, judgment was signed, and execution issued, and a levy under it made on the 21st. On the 23d,

Parry obtained a rule nisi to set aside the judgment, and all subsequent proceedings, for irregularity. The affidavit upon which the rule was obtained, stated, that the declaration was filed on the 9th of May, 1849, and that judgment was signed on the 17th, as for want of a plea; that there had been no rule to plead given in the cause, nor had there been any order for time, or other proceeding in the cause which would render the giving a rule to plead unnecessary; but that, upon searching the files of the court, the deponent found, that, on the said 9th of May, a rule to plead was given by the plaintiff's attorney in a cause of "*Carpenter v. Hall*;" and that the defendant had a good defence to the action upon the merits. The case of *Warne v. Beresford*, 4 Dowl. P. C. 361, was cited.

Byles, Serjt., now showed cause. There has been no irregularity: and, if there has been, it has been waived by the act of the defendant in obtaining a *consent to further time to plead, and by the delay in coming to the court. The irregularity complained of is, that judgment was signed without a rule to plead,—the entry in the rule book being “*Carpenter v. Hall*,” instead of “*Carpenter and Another v. Hall*.” In *Christie v. Walker*, 1 Bingh. 187, 7 J. B. Moore, 599, where the plaintiff had signed judgment as for want of a plea, because the rule to plead several matters was erroneously intituled “*Christie v. Walker*,” instead of “*Christie v. Walker and Another*,” the court set aside the judgment *without costs*, it being sworn that the pleas were true, and that the defendant had a good defence. *Davies v. Edmeades*, 1 Dowl. N. S. 423, comes very near to this case: there, the rules to plead in two separate actions, being intituled “*Davies v. Tidmarsh*,” and “*Same v. Edmeades*,” it was urged that there was no such cause as “*Same v. Edmeades* ;” but the court held it to be no irregularity, there being no affidavit on the part of the defendant that he had been misled. There is no suggestion here that the defendant was misled.

Assuming this to have been an irregularity, the defendant was bound to complain of it promptly. [WILDE, C. J. What amounts to a waiver of an irregularity in a rule to plead? Is taking out a summons for time to plead, a waiver? Or, is simply *asking* for time, a waiver?] Taking out a summons for time, *is* a waiver: *Nugee v. M'Donell*, 3 Dowl. P. C. 579; *Bolton v. Manning*, 5 Dowl. P. C. 760: and so, it is submitted, is asking for, *and obtaining* time. [CRESSWELL, J. In *Nias v. Spratley*, 4 B. & C. 386, 6 D. & R. 390, it was held, that, after a judge's order making it imperative for a defendant to plead within a given time, and no plea being pleaded within that time, the plaintiff may sign *judgment without giving a rule to plead.] The defendant was bound to come promptly after the irregularity complained of was committed: and he must be assumed to have known of it; or, at all events, it lay on him to show that he did not. In *Archbold's Practice*, 8th edit., by Chitty, p. 1273, it is said: “It rests upon the party complaining of the irregularity to show that he had no knowledge of it: *Anderdon v. The Earl of Stirling*, 2 Dowl. P. C. 267; *Herbert v. Darley*, 4 Dowl. P. C. 726. And it would seem to follow from one case, that, at least where the irregularity is apparent on the face of the proceeding, the applicant is bound to come promptly after he knows of the *proceeding*, and not merely after he knows of the *irregularity* itself:” *Esdaile v. Davis*, 6 Dowl. P. C. 465; *Tarber v. French*, 5 N. & M. 658. [MAULE, J. Having the declaration, or the notice of it, the presumption is that the defendant knows of the irregularity.]

Parry, in support of the rule. This clearly was not a rule to plead in the cause. In *Warne v. Beresford*, it was distinctly held that a rule to plead in a wrong name, is a nullity. If an order had been obtained

for time to plead, or even a consent endorsed upon a summons, it may be conceded that the irregularity would have been waived. But nothing of the sort has occurred here. In no case has it been held that the mere *asking* for time, waives an irregularity of this kind: nothing less than a step which puts the opposite party to expense, has ever been held to have that effect. [WILDE, C. J. That is not so: agreements of parties have been held, over and over again, to operate as a waiver of irregularities.] There must be an act done. [MAULE, J. The defendant has obtained all the advantage he would have obtained from a judge's order, or an endorsement *on a summons.] Possibly he may, but the plaintiff was not bound to give it. (a) [*87]

WILDE, C. J. It seems to me that this case falls within a very ordinary rule. The defendant asks us to set aside the judgment, on the ground that there has been no rule to plead. The plaintiff's answer to that, in effect, is, "I did not think it necessary to take steps to compel the defendant to do that which he agreed to do." The affidavit upon which the motion is founded is made by a person who is perfectly well aware of the answer that might be expected. He says that "there hath been no rule to plead given in this cause, nor hath there been any order for time, or other proceeding in this cause which would render the giving a rule to plead unnecessary,"—a very unusual clause to find in an affidavit of this kind. The defendant applied for and obtained the assent of the plaintiff's attorney to his having two days' further time to plead. He has had all the benefit that was contemplated. The effect of that agreement, I think, was, to waive any previous irregularity in the rule to plead. Irregularities in process are constantly waived by agreement of the parties. It appears to me, therefore, that this judgment was perfectly regular, notwithstanding there was no rule to plead. And, coming, as he does, to set aside the proceedings, against good faith, I think the rule should be discharged with costs.

Parry proposing,—merits being sworn to,—to bring the money into court within a week, and pay the costs, the court on those terms made the Rule absolute accordingly.

(a) "Asking for time, is an admission that the plaintiff is in a situation to go on; but I do not know that it is an admission that the step was regular." Per PARKES, J., *Anonymous*, 1 Dowl. P. C. 23. It seems, rather an assent to the further progress of the cause, whether the step was irregular or not.

*GREENE v. REECE. June 19.

[*88]

The 26th section of the 6 & 7 Vict. c. 73, only disables an uncertificated attorney from suing for fees, rewards, or disbursements for any business, matter, or thing done by him as an attorney or solicitor in some suit or proceeding in one of the courts mentioned in the act.

ASSUMPSIT. The declaration stated that the defendant was indebted to the plaintiff in the sum of 400*l.*, for the work and labour, care, dili-

gence, journeys, and attendances of the plaintiff, before then done, performed, and bestowed by the plaintiff as the attorney and solicitor of and for the defendant, and otherwise for the defendant, on his retainer, and at his request, and for fees due and of right payable from the defendant to the plaintiff in respect thereof, and for materials and necessary things by the plaintiff provided in and about the said work and labour, for the defendant, and at his request; and for money lent, &c.; and for money had and received, &c.

There was a second count, for money found due upon an account stated.(a)

The defendant pleaded, amongst other pleas,—fourthly, as to the sum of 63*l.* 8*s.* 6*d.*, parcel of the said sum of 400*l.* in the first count mentioned, that the said debt or sum of 63*l.* 8*s.* 6*d.*, parcel, &c., was and is composed, and consists, of certain fees, rewards, and disbursements alleged to be due to the plaintiff for and in respect of business, matters, and things done in England by him, the plaintiff, as an attorney and *89] solicitor for him, the defendant, after the passing of the *said act of parliament(b) relating to attorneys and solicitors practising in England and Wales; that the plaintiff had not, at the times when the said business, matters, and things were done by him as such attorney and solicitor *as aforesaid*, or at any or either of such times, obtained a stamped certificate authorizing him to practise as such attorney or solicitor, which was then in force; and that the said business, matters, and things, and each and every of them, were and was done while the plaintiff was without such certificate as last aforesaid,—verification.

To this plea, the plaintiff demurred specially, assigning the following causes,—That it was not alleged in, nor did it appear from, the plea, that the said business, matters, and things therein mentioned were done by the plaintiff as an attorney or solicitor in or relating to the suing, prosecuting, defending, or carrying on of any action or suit, or other proceeding or proceedings, in any court whatsoever;—that, although the first count related, not only to the work and labour, care, diligence, journeys, and attendances of the plaintiff, done, performed, and bestowed by the plaintiff as an attorney and solicitor, but also to work and labour, care, diligence, journeys, and attendances done, performed, and bestowed by the plaintiff otherwise than as an attorney or solicitor, the said plea was pleaded generally as to the sum of 63*l.* 8*s.* 6*d.*, parcel of the sum of money in the said first count mentioned, without any limitation of the said fourth plea to such of the said work and labour, care, diligence, journeys, and attendances in the said first count mentioned, as were done,

(a) The particulars of demand, which were annexed to the paper-book, claimed 270*l.* 0*s.* 2*d.* “for work done during the years 1847 and 1848, by the plaintiff, as an attorney, solicitor, and otherwise, materials provided, money paid, &c., the full particulars whereof were contained in a signed bill of costs delivered to the defendant on the 6th of September, 1848,” and 67*l.* for money paid to the defendant, or at his request.

(b) 6 & 7 Vict. c. 73, referred to in a preceding plea.

performed, and bestowed by the plaintiff as an attorney and solicitor, and not otherwise;—and that, although the first count included causes of action for *money lent by the plaintiff to the defendant, and for [*90 money received by the defendant for the use of the plaintiff, as to which causes of action the plea could be no answer, the said plea was pleaded generally as to the said sum of 68*l.* 8*s.* 6*d.*, parcel, &c., without excepting or excluding from the application of the said fourth plea such last-mentioned causes of action, &c.

Joinder in demurrer.

Talfourd, Serjt., in support of the demurrer. The main objection to the plea is, that it does not show that the work and labour was done by the plaintiff as attorney or solicitor in the conduct of any proceeding at law or in equity: it merely alleges that the debt as to which the plea is pleaded, consists of fees, rewards, and disbursements alleged to be due to the plaintiff for and in respect of business done by him as an attorney and solicitor for the defendant, after the passing of the 6 & 7 Vict. c. 78, and that, at the time the said business was so done, the plaintiff was uncertificated. The defence is founded upon the 27th section of the statute, which enacts “that no person who, as an attorney or solicitor, shall sue, prosecute, defend, or carry on any action or suit or any proceedings in any of the courts aforesaid,^(a) without having previously obtained a stamped certificate which shall be then in force, shall be capable of maintaining any action or suit at law or in equity for the recovery of any fee, reward, or disbursement for or in respect of any business, matter, or thing done by him as an attorney or solicitor as aforesaid whilst he shall have been without such certificate as last aforesaid.” This question has already been before the Court of Exchequer in a case of *Richards v. Lord Suffield*, 2 Exch. 616, where it was held that the 26th *section of the 6 & 7 Vict. c. 78, only disables an uncertificated [*91 attorney from suing for fees, rewards, or disbursements for any business, matter, or thing done by him as an attorney or solicitor in some suit or proceeding in one of the courts mentioned in the act, and not for business done which had no reference to such suits or proceedings. *PARKE*, B., in delivering the judgment of the court, said: “The question is, what meaning we are to attribute to the words of reference in the expression ‘as an attorney as aforesaid.’ We think they must necessarily refer either to an attorney or solicitor acting as described in the commencement of that section, or to the previous description of an attorney and solicitor in the 2d section; and, in the former case, the disability will be confined to suits for fees, &c., due for business done as an attorney, in suing, prosecuting, defending, or carrying on any action or suit, or any proceedings, in any of the courts aforesaid; in the latter, for fees due to an attorney, &c., acting as such in suing out any writ or process, or commencing, carrying on, soliciting, or defending any action,

(a) The superior courts of common law and equity.

suit, or other proceeding in the name of any other person, or in his own name, in any of the courts mentioned in the 2d section, including proceedings before one or more justices; so that it really makes no difference whether the words 'as aforesaid' relate either to the beginning of the 26th section or to the 2d. To one or the other they certainly do refer; and, in either, the disability to sue is confined to fees, &c., connected with a suit. It was, however, argued that the difference of the language of the legislature, in the 35th and 36th sections, from that in the 26th, indicated a different intention in the legislature. It appears to us that the words of reference 'as an attorney or solicitor as aforesaid,' confine the liability to the same class of fees, rewards, and disbursements as those pointed *out expressly in the 35th and 36th sections. This being *92] so, the plea is, in our opinion, defective, in not averring that the fees, &c., were due to the plaintiff as an attorney, in prosecuting or defending a suit or proceeding in a court; they are not even stated to be due to him as an *attorney-at-law*, and they might be payable to him as an attorney acting before arbitrators or a compensation jury, or transacting business under a power of attorney for the defendant." It is impossible to distinguish that case from the present. A party may be the attorney of another, without being an officer of any court.

J. Brown, contra, prayed leave to amend; which was granted, upon the usual terms. Rule accordingly.

ELIZABETH DAKIN, Administratrix of WILLIAM DAKIN,
deceased, v. BROWN and MUNT. June 19.

In case against engineers for so negligently constructing and erecting a machine, that it exploded, and killed the husband of the plaintiff, the defendants pleaded, that, at the time of the accident, the machine was unfit for use, by reason of the dampness of the brick-work in which it was set; that they so informed the deceased, and cautioned him not to use it; and that, by reason of the premises, the machine exploded, as in the declaration mentioned,—concluding with a verification:—

Held, that the plea did not present a confession and avoidance of the whole cause of action, but was an informal traverse of a part only, and therefore bad.

CASE. The declaration stated that William Dakin, in his lifetime, to wit, on the 17th of January, 1847, retained and employed the defendants, at their request, in the way of their trade and business, to make and construct for him the said William Dakin a certain coffee-roasting apparatus, and to erect and affix the *same for him in and upon certain pre- *98] mises of him the said William Dakin, to wit, situate, &c., for the purpose of roasting coffee therewith, for certain pecuniary remuneration and reward to be therefore paid to the defendants by the said William Dakin; that the defendants then, to wit, on the day and year aforesaid, accepted the said retainer and employment, and then agreed with the said William Dakin, to make and construct, erect, and affix the said coffee-roasting apparatus for the purpose, upon the terms, and in the

manner aforesaid; that afterwards, to wit, on the day and year aforesaid, the defendants did, in pretended pursuance of their said retainer and employment, and in pretended performance of their said agreement, make and construct a certain coffee-roasting apparatus, for the purpose of roasting coffee therewith, and did then erect and affix the same in and upon the said premises of the said William Dakin for the said purpose; nevertheless, that the defendants, disregarding their duty in and about the premises, behaved and conducted themselves so wrongfully, negligently, carelessly, and improperly in and about the said making and constructing, erecting and affixing of the last-mentioned apparatus, and made and constructed the same of such bad, insufficient, and improper materials, and in so bad, improper, and unskilful a manner, and erected and affixed the same so badly, improperly, and unskilfully, and conducted themselves with such gross carelessness, negligence, and want of skill, that, by and through the defendant's wrongful acts, neglect, and default, in and about the premises, and not otherwise, the said apparatus so made and constructed, erected, and affixed by the defendants as aforesaid, was not reasonably fit for the said purpose of roasting coffee therewith; but that, on the contrary thereof, the same was then, by and through the defendant's said wrongful acts, neglect, and default, and not otherwise, *wholly unfit and improper for the said purpose; and that, by reason thereof, and of the defendant's said wrongful acts, neglect, and default, and of the said bad and improper making, construction, erection, and affixing of the said apparatus, and not otherwise, the said apparatus afterwards, and in the lifetime of the said William Dakin, and whilst he was using the same for the purpose of roasting coffee therewith, and not otherwise, in a lawful, proper, and reasonable manner in that behalf, to wit, on the day and year aforesaid, without any neglect or default of the said William Dakin, exploded and was shattered and blown to pieces; and that thereby, and by means thereof, and not otherwise, the said William Dakin, in his lifetime, was then and there, and within twelve calendar months before the commencement of this suit, by reason thereof, and not otherwise, killed: To the damage, &c.; and thereupon the plaintiff, as such administratrix as aforesaid, for the benefit of herself, the wife of the said William Dakin, and of Mary Dakin, his infant daughter, of the age of fourteen years, and of Elizabeth Emma Dakin, his infant daughter, of the age of ten years, according to the form of the statute in such case made and provided, brought her suit, &c.—Profert of letters of administration.

The defendants pleaded, amongst other pleas—fourthly, that, at the said time of the said using by the said William Dakin of the said coffee-roasting apparatus, and of the same exploding and being shattered and blown to pieces as in the declaration mentioned, the said coffee-roasting apparatus was in a state unfit and improper and unsafe and dangerous to be used for the roasting of coffee, by reason of certain brickwork which

had just before then been necessarily erected for and in and about the fixing of the said coffee-roasting apparatus, being then in a wet and damp state and condition, from the same having been then so recently erected *95] as aforesaid, and from a sufficient time for the necessary drying thereof not having then elapsed, to wit, since the said erecting thereof,—of all which premises in that plea mentioned, the defendants, before and at the time of the said using by the said William Dakin of the said coffee-roasting apparatus, to wit, on the day and year in the declaration in that behalf mentioned, gave notice to the said William Dakin, and just before the said time of his said using of the said coffee-roasting apparatus, to wit, on the day and year in the declaration in that behalf mentioned, informed the said William Dakin, that, for the cause aforesaid, the said apparatus then was not, and would not be, fit to be used on that day, for the roasting of coffee, and requested and warned and cautioned the said William Dakin not so to use the same; and that, by reason of the same premises, the said coffee-roasting apparatus, upon and in the said using thereof by the said William Dakin as aforesaid, exploded and was shattered and blown to pieces, as in the declaration mentioned,—verification.

To this plea, the plaintiff demurred specially, assigning for causes, amongst others, the following,—That the plea neither properly traversed, nor confessed and avoided, the declaration, or any of the matters therein;—that, as a traverse, it was bad for argumentativeness, inasmuch as it alleged matter which might be inconsistent with the plaintiff's right of action, without denying in direct and positive terms any of the material allegations of the declaration; and that it was also bad, as a traverse, for concluding with a verification;—that it was bad as in confession and avoidance, for not giving colour to the plaintiff, or confessing any *prima facie* or colourable right in her to maintain the action, and also, if it did confess any colourable right, for not sufficiently avoiding *96] it;—that, either it admitted negligence in the defendants' causing the intestate's death, or it did not; if it did admit such negligence, the matter set forth in the plea was immaterial, idle, and irrelevant, and afforded no answer or ground of defence whatever to the action; if it did not admit it, it in effect denied the alleged breach of duty, and amounted to not guilty; if it neither admitted nor denied the alleged breach of duty of the defendants, it was bad on that ground;—that, if it was intended to exonerate the defendants from liability, by imputing the intestate's death to his own act, it amounted to the general issue; if it did not intend to exonerate the defendants, it was immaterial, and tended to an immaterial issue;—that, if the plea was not co-extensive with the general issue, not guilty, it tended improperly and unfairly to narrow the issue, and was bad on that ground;—that it was ambiguous, as it might or might not mean that the explosion was caused by the alleged dampness of the brickwork, or by the negligence of the intestate; that, if it was intended

to mean that the death of the deceased was the result of either of those causes, it amounted to the general issue; that, if it did not mean this, it was no defence; and that, in either view, it was bad, for not showing clearly what it meant, or was intended to mean;—that it did not show that the intestate's death was caused solely by or through the alleged premises, nor did it show to what degree they were contributive to the death, or enable the court to determine whether it was the result of those causes or of the defendants' negligence;—and that the plea amounted to the general issue.

Joinder in demurrer.

Needham, in support of the demurrer. Whatever the meaning of the plea in question,—whether it sets *up negligence on the part of [*97 the deceased, or that his own voluntary act was contributory to the accident which caused his death,—it is equally open to objection. In *Bridge v. The Grand Junction Railway Company*, 8 M. & W. 244, (a) in case for the negligent management of a train of railway carriages, whereby it ran against another train, in one of the carriages of which the plaintiff was riding, and injured him,—the defendants pleaded that the parties having the management of the train in which the plaintiff was, managed it so negligently and improperly, that, in part by their negligence, as well as in part by the defendants' negligence, the defendants' train ran against the other, and caused the injuries to the plaintiff: and it was held, that the plea was bad in form, as amounting to not guilty, and in substance, for not showing, not only that the parties under whose management the plaintiff was, were guilty of negligence, but also that by ordinary care they could have avoided the consequences of the defendant's negligence. *Holden v. The Liverpool New Gas Company*, 3 Man. Gr. & S. 1, is also an authority to show that this plea amounts to not guilty. There, a gas company incorporated by act of parliament, with the usual powers to take up pavements, &c., for the purpose of laying down and repairing mains, pipes, &c., had for some years supplied gas to a house belonging to the plaintiff; the *only* means of shutting it off being by a stop-cock *within* the house, the key of which was kept by the occupier. The last tenant, on quitting, gave notice to the company that he should not require any further supply; and one of their workmen, at his request, removed a chandelier from one of the rooms, leaving *the end of the pipe properly secured. The inter- [*98 nal fittings were the property of the plaintiff. Whilst the house remained untenanted, the gas by some unexplained means escaped, and an explosion took place, by which the house was considerably damaged. In case against the company, alleging a breach of duty on their part, in not taking proper means to prevent the influx of gas into the house, —it was held, upon the authority of *Bridge v. The Grand Junction Rail-*

(a) S. C. nom. *Armitage v. The Grand Junction Railway Company*, 6 Dowl. P. C. 340. And see *Gough v. Bryan*, 2 M. & W. 779; *Woolf v. Beard*, 8 C. & P. 373.

way Company, that negligence on the part of the plaintiff, was an admissible defence under not guilty. If that be so, it is difficult to see how the plea, confessing what it must be admitted it does confess, shows any avoidance of the matter confessed. On the other hand, the declaration avers that the accident happened through the negligence and unskilfulness of the defendant, and not otherwise: the plea, admitting that, sets up matter which at the best only shows a degree of negligence on the part of the deceased, or something which, by negating what is alleged in the declaration, removes the defendant's liability. The plea improperly narrows the issue to be presented to the jury. [MAULE, J. It is in that respect more favourable for the plaintiff: no doubt, if the defendant were put to his election between this plea and not guilty, he would choose the latter.] The plea is bad in substance. There is nothing to show that there was any negligence on the part of the deceased, or that the accident might have been averted by the use of ordinary and reasonable care on his part. Upon this point, the judgment of PARKE, B., in *Bridge v. The Grand Junction Railway Company*, is conclusive.

*99] *Dowling*, Serjt., contra.(a) The plea is good in substance and in form: in truth, it is framed in strict accordance with the suggestion thrown out by PARKE, B., in *Bridge v. The Grand Junction Railway Company*. In that case, as in the case of *Holden v. The Liverpool New Gas Company*, the substance of the defence was, that the plaintiff, or those for whose acts he was responsible, was contributory with the defendant to the damage. Here, the defendants seek to excuse themselves from the consequences of their unlawful act, by reason of the negligent conduct of the deceased. The plea contains a good confession and avoidance. It admits, that, by reason of the dampness of the brickwork, the apparatus was unsafe: it admits an imperfect performance of the defendants' duty. [CRESSWELL, J. The charge in the declaration is, that the intestate's death was caused by the negligence and want of skill of the defendants. Does the plea admit that?] Not in terms. [CRESSWELL, J. Then it does not confess the cause of action. MAULE, J. The plea certainly does not confess the whole of the cause of action; and, if it traverse a part, it should conclude with a verification.]

COLTMAN, J. In substance, the fourth plea is a traverse of part of the cause of action, informally pleaded.

The rest of the court concurring, Judgment for the plaintiff.(b)

(a) The points marked for argument on the part of the defendants, were,—“That the defence contained in the fourth plea, could not be given in evidence under not guilty;—that the plea was a good plea in confession and avoidance, confessing the *prima facie* case charged against the defendants in respect of the unfitness, at the said time when, &c., of the apparatus, for the purpose in the declaration mentioned, and avoiding the same by reason of the special circumstances and notice mentioned in the plea;—and that, even if the matter of defence contained in the fourth plea were admissible under not guilty, the plea was good, inasmuch as it gave sufficient colour.”

(b) Vide post, p. 115.

*MASTERS v. IBBERSON. June 19.

[*100]

To a count on a promissory note made by the defendant, payable to the order of A., and endorsed by A. to B., and by B. to the plaintiff, the defendant pleaded that the note was obtained from him by D. and others in collusion with him, by fraud; that there was no consideration for the endorsement by A. to B.; and that the plaintiff had notice of the fraud:—Held, bad, there being nothing to impeach A.'s title to the note.

A further plea stated that the consideration for the note was the forbearance to prosecute the defendant's son upon a charge of felony,—not averring that a felony had been committed, or affecting A., the payee, with notice of the alleged illegality of the consideration:—Held, bad.

ASSUMPSIT. The first count stated that the defendant, on the 19th of August, 1848, made his promissory note in writing, and thereby promised to pay to the order of Mary Jones, 85*l.*, five months after the date thereof,—which period had elapsed, and the said note had become due and payable before the commencement of this suit,—and then delivered the said note to the said Mary Jones, who then endorsed the same to a person on the said note designated as W. L. Vincent, who then, by that designation, endorsed the same to the plaintiff; and the defendant then promised the plaintiff to pay him the amount of the said note, according to the tenor and effect thereof, and of the said endorsements.

Fifth plea,—that the said promissory note in the said first count mentioned, was obtained from the defendant by one George Bromfield, and others in collusion with him, by fraud and covin practised upon him the defendant by the said George Bromfield and the said others in collusion with him; and that there never was any value or consideration for the said endorsement of the said note by the said Mary Jones to the said person designated as W. L. Vincent, or for the said endorsement by him to the plaintiff, or for the said W. L. Vincent, or the plaintiff, being the holder of the said note,—verification.

Special demurrer, assigning for causes,—that the *plea contained no defence to the first count, inasmuch as it did not properly aver that Mary Jones, the payee of the note, was any party to the alleged fraud, or had any notice of it, or was not a *bond fide* holder for value;—that, if the general allegation of there never having been any consideration for the plaintiff's being the holder of the note, were taken to include absence of consideration to her, then the plea was bad for generality, in not showing how she held it, whether as trustee for Bromfield or any other parties to the alleged fraud, or otherwise, as, by way of loan to her, or for her accommodation; and, in such case, the plea was also bad for duplicity, as setting up two distinct defences, the one of fraud and want of consideration as respected some only of the parties to the note, and the other the defence of total want of consideration as respected all the parties to the note, including the payee and first endorser.

Sixth plea,—That the said promissory note in the first count mentioned, was obtained from the defendant by the said George Bromfield, and others in collusion with him, by fraud and covin practised upon him,

[*101]

the defendant, by Bromfield, and the said others in collusion with him; and that the said W. L. Vincent and the plaintiff, respectively, before and at the several times when the said note was first endorsed to them respectively, and when each of them first received the same, had notice of the premises in this plea aforesaid,—verification.

Special demurrer, assigning for causes,—that the plea did not aver that Mary Jones, the payee of the note in the first count mentioned, did not give full value for the note, or had any notice of the fraud at the time she took it, nor did it show in what character she held the note, whether as trustee for Bromfield or any of the said other parties, or otherwise.

*102] *Seventh plea,—that the said promissory note in the said first count mentioned was obtained from the defendant by the said George Bromfield, and others in collusion with him, by fraud and covin practised upon the defendant by Bromfield and the said others in collusion with him; and that the said note was payable and overdue, according to the tenor and effect thereof, before and at the time when the same was first endorsed by Mary Jones to W. L. Vincent, and before and at the time when the same was first endorsed by Vincent to the plaintiff, and before and at the time when Vincent and the plaintiff, respectively, first took and received the same,—verification.

Special demurrer, assigning for cause,—that it was not shown in the plea, that Mary Jones, the payee of the note in the first count mentioned, was not a *bona fide* holder for value of the said note, or that she had any notice of the fraud alleged, if any existed, or could not have sued upon the note, or had not capacity to transfer a right of action to the party to whom she endorsed it, or in what character she held it.

Eighth plea,—that, just before the making of the said promissory note in the said first count mentioned, to wit, on the 19th of August, 1848, one George Bromfield accused one Christopher Ibberson, the son of the defendant, and then being the servant of the said George Bromfield, of a certain felony, to wit, of having feloniously stolen, taken, and carried away divers moneys of the said George Bromfield, and then threatened to indict and prosecute the said Christopher Ibberson for the said supposed felony; that thereupon the defendant, in consideration that the said George Bromfield would forbear to prosecute the said Christopher Ibberson for the said supposed felony, made the said promissory note in the said first count mentioned, and there never was any other consideration for the making of the said note, *or for the payment by the
108] defendant of the amount thereof, or of any part thereof; that the said Mary Jones endorsed the said note to the said person thereon designated as W. L. Vincent, without any value or consideration; and that the said person designated as W. L. Vincent endorsed the same to the plaintiff without any value or consideration, and there never was any value or consideration either for the endorsement of the said note by

Mary Jones to the said W. L. Vincent, or for the said endorsement thereof by the said W. L. Vincent to the plaintiff, or for the said W. L. Vincent or the plaintiff being the holder of the said note,—verification.

Special demurrer, assigning for causes,—that it did not appear on the face of the plea, whether Christopher Ibberson was or was not guilty of felony; so that it was left uncertain whether the defence intended to be set up, was, that the consideration of the note was illegal, or that there was no consideration for it;—that it contained no defence to the first count, inasmuch as it did not properly aver that Mary Jones, the payee of the note, was any party to the alleged illegal arrangement, or had any notice of it, or was not a *bond fide* holder for value of the said note;—that, if the general allegation of there never having been any consideration for the plaintiff's being the holder of the note, were taken to include absence of consideration to her, then the plea was bad for generality, in not showing how she held it, whether as trustee for Bromfield or any of the other parties to the alleged illegal arrangement, or otherwise, as, by way of loan to her, or for her accommodation;—and that, in such case, the plea was also bad for duplicity, in setting up two distinct defences, the one, of illegality and want of consideration as respected some only of the parties to the note, and the other, the defence of total want of consideration as *respected all the parties to the note, including [*104 the payee and first endorser.

Ninth plea,—like the eighth, down to the *asterisk*, except that the ninth plea stated that Christopher Ibberson, the son, was the servant of *the defendant*. It then alleged, that there never was any other consideration for the making of the said note, or for the payment by the defendant of the amount thereof, or of any part thereof; and that the said person designated as W. L. Vincent, and the plaintiff, before and at the several times when the said note was first endorsed to them respectively, and when they respectively first received the same, had notice of the premises in this plea aforesaid,—verification.

Special demurrer, assigning for causes,—that it did not appear on the face of the plea, whether the said Christopher Ibberson was or was not guilty of felony; so that it was left uncertain whether the defence intended to be set up, was, that the consideration of the note was illegal, or that there was no consideration for it;—that it contained no defence to the first count, inasmuch as it did not properly aver that Mary Jones, the payee of the note, was any party to the alleged illegal arrangement, or had any notice of it, or was not a *bond fide* holder for value of the said note; nor did it show in what character she held it, whether as trustee for Bromfield or any of the other parties to the alleged illegal arrangement, or otherwise, or that she had not full capacity to transfer by endorsement a right of action upon the said note.

Tenth plea,—like the eighth plea, down to the *asterisk*: it then proceeded to aver, that the said note was payable and overdue, according

to the tenor and effect thereof, before and at the time when the same was first endorsed by Mary Jones to W. L. Vincent, and before and at *105] the time when the same was first endorsed by *Vincent to the plaintiff, and before and at the respective times when Vincent and the plaintiff respectively first took and received the same,—verification.

Special demurrer, assigning for causes,—that it did not appear upon the face of the plea, whether the said Christopher Ibberson was or was not guilty of felony; so that it was left uncertain whether the defence intended to be set up, was, that the consideration of the note was illegal, or that there was no consideration for it;—that it contained no defence to the first count, inasmuch as it did not properly aver that Mary Jones, the payee of the note, was any party to the alleged illegal arrangement, or had any notice of it, or was not a *bond fide* holder for value of the said note, or could not have sued upon it herself, or had not capacity to transfer a right of action upon it to the person to whom she endorsed it, or anything to show that the said endorsement was not a valid one; and that the plea was defective, in not showing how she held the note, whether as trustee for Bromfield, or otherwise, as, by way of loan to her, or for her accommodation.

Joinder in demurrer.

Fortescue, in support of the demurrers. The fifth, sixth, and seventh pleas allege that the note was obtained from the defendant by fraud, and that there was no consideration for the endorsement: but there is nothing to implicate Mary Jones, the payee, in the fraud, or to affect her with notice. A bill or note payable to the order of a person, is payable to himself: *Sheldon v. Occarsen*, Bayley on Bills, 6th edit. p. 414; *Smith v. M'Clure*, 5 East, 476, 2 J. P. Smith, 43. [CRESSWELL, J. There is no doubt about that.] Then, here is a party on the record whose title as *106] a *bond fide* *holder stands unimpeached. In *May v. Chapman*, 16 M. & W. 855, to an action by endorsee against A. and B. as drawers of a bill of exchange, endorsed to C., and by him to the plaintiff,—A. pleaded that he and B. were in co-partnership as brewers; that B. made and endorsed the bill, using the name of the firm, in fraud of A., and not for the purposes of the co-partnership, but for his own private purposes, viz. for a private debt due from him to C., and without the knowledge or consent of A.; that there was no consideration or value for him, A., for the drawing or endorsement of the bill; that, at the time of the endorsement to him, C. had knowledge and notice of the premises; and that, at the time when the note was endorsed and delivered to the plaintiff, he had full knowledge and notice of all the premises in the plea aforesaid. The plaintiff replied, that, at the time when the bill was endorsed and delivered to the plaintiff, he had not any such knowledge or notice as in the plea mentioned,—whereupon issue was joined. At the trial, the jury found that C. had no knowledge of the original fraud

in the drawing of the bill, but that the plaintiff, at the time of the endorsement to him, had knowledge of that fraud: and it was held that the plea was not proved. *Gill v. Cubitt*, 3 B. & C. 466, 5 D. & R. 324, 1 C. & P. 163, 487,—where it was held that a broker who had taken a bill under circumstances of suspicion, could not recover on it,—being there cited, PARKE, B., observed that that case must be considered as overruled. One who takes by endorsement from a party having good title, must be presumed to be an innocent endorsee: *Bramah v. Roberts*, 3 N. C. 963, 5 Scott, 172. The plaintiff could neither traverse these pleas nor take issue on them.

The eighth, ninth, and tenth pleas are open to the *same objection, and also to another, viz. that they do not allege that a [107 felony had in fact been committed.

Prentice, contra. No one can avail himself of a contract that is based in fraud. In *Cornfoot v. Fowke*, 6 M. & W. 358, in assumpsit for the non-performance of an agreement to take a ready-furnished house, the defendant pleaded that the plaintiff caused and procured the defendant to enter into the agreement, by means of fraud, covin, and misrepresentation of the plaintiff and others in collusion with him; on which issue was joined. It appeared at the trial, that the plaintiff had employed one C. to let the house in question, and the defendant, being in treaty with C. for taking it, asked him "if there was any objection to the house," to which C. answered that there was not; and the defendant entered into and signed the agreement, but afterwards discovered that the adjoining house was a brothel, and on that ground declined to fulfil the contract. It appeared that the plaintiff knew of the existence of the brothel before, but C., the agent, did not. It was held (*per* Lord ABINGER, C. B.), that it was not sufficient, to support the plea, that the representation turned out to be untrue, but that for that purpose it ought to have been proved to have been fraudulently made; that, as the representation was not embodied in the contract, the contract could not be affected by it, unless it were a fraudulent representation; and that the knowledge of the plaintiff of the existence of the nuisance, and the representation of the agent that it did not exist, were not enough to constitute fraud, so as to support the plea. PARKE, B., in the course of the argument, says: "The difficulty here is, that, under this plea, you are to make out fraud in the plaintiff or his agent; but it is not shown that the agent *knew of the existence of this objection to the house, and the [108 plaintiff did not make the representation, or know of its having been made. If you could make out that the plaintiff knew that Clarke was ignorant of it, and had employed him on purpose that he might make that answer, then it might have been a fraud in the plaintiff." The counsel then submitted "that the knowledge of the principal is the knowledge of the agent, and *vice versa*; if so, it is the same as if the representations were made by the plaintiff himself. In *Fitzherbert v. Mather*, 1

T. R. 12, it was so held: and ASHHURST, J., says, 'On general principles of policy, the act of the agent ought to bind the principal; because it must be taken for granted that the principal knows whatever the agent knows:' and BULLER, J., says, 'Though the plaintiff be innocent, yet, if he build his information on that of his agent, and his agent be guilty of a misrepresentation, the principal must suffer.' In *Doe d. Willis v. Martin*, 4 T. R. 39, the doctrine that the knowledge of the agent is the knowledge of the principal, is fully recognised; and Lord KENYON there says, 'The maxim that the principal is civilly responsible for the acts of his agent, universally prevails both in courts of law and equity.'" Upon which PARKE, B., adds: "That was the fraud of the agent, and it cannot be disputed that that would vitiate the transaction." So, here, the person by whom the fraud was committed must be assumed to be the agent of Mary Jones: and it is quite clear, that, if the contract is obtained by the fraud of the agent, the principal cannot enforce it. In *Raphael v. Goodman*, 8 Ad. & E. 565, 8 N. & P. 547, to an action by a sheriff against an execution-creditor, on a bond of indemnity for seizing *109] goods under a *fi. fa.* the defendant pleaded *that the bond was obtained from him, *by the plaintiff and others in collusion with him*, by fraud and misrepresentation: it was held that the defendant supported this plea by proof that the sheriff's officer who executed the process, obtained the bond by fraud and misrepresentation, though the plaintiff did not appear to have been personally cognisant of any part of the transaction. [CRESSWELL, J. I cannot discover that that case has the slightest bearing upon this.] There is enough on the face of the fifth plea to show that Mary Jones could not have sued upon this note. [MAULE, J. The plea does not state that the delivery of the note to Mary Jones was obtained by fraud: it merely states that the note, in the course of its existence, was the subject of a fraud by Bromfield.] Delivery is an essential part of the making of a note. And, if the delivery in the declaration mentioned was obtained by the fraud even of a stranger, Mary Jones could found no title upon it.

The eighth, ninth, and tenth pleas are clearly good. They state, in substance, that the consideration for the note was, the stifling a prosecution for felony: and the transaction is by proper averments brought home to the plaintiff. It is no objection, that the pleas do not distinctly allege that a felony had actually been committed: it is equally improper to compromise a charge, whether the party be really guilty or not. In *Collins v. Blantern*, 2 Wils. 341 (1 Smith's Leading Cases, 154), to an action of debt on bond, the defendant pleaded, that, before and at the time of the making of the bond, and the note after mentioned, two of the obligors, John and Thomas Walker, and three others, stood indicted by John Rudge, on five indictments, for wilful and corrupt perjury, and had severally pleaded not guilty before the making of the bond and note; that the several traverses on the indictments were, at the time of the

making the unlawful agreement after mentioned, and *the note and the bond, viz. on the same day the bond was made, were [*110 about to come on to be tried at Stafford; that thereupon it was then corruptly agreed between Rudge, the prosecutor, the plaintiff, and the five persons indicted, that the plaintiff should give the prosecutor Rudge his note for 850*l.*, in consideration of his not appearing to give evidence at the trial of the said traverses; and that the obligors should execute the bond to the plaintiff of the same date as the note, as an indemnity to the plaintiff for giving such note. The plea then averred that the plaintiff gave to Rudge, the prosecutor, the note for 850*l.*, for not appearing as prosecutor, and giving evidence; that the obligors, on the giving of the note, executed the bond as an indemnity to the plaintiff for giving such note; that the bond was given for the said consideration, and no other; and that the obligors were not indebted to the plaintiff; and therefore the bond was void in law. There was nothing there to show whether the parties were guilty or not. WILMOT, C. J., delivering the judgment of the court, said: "It hath been insisted, for the plaintiff, that he was not privy to the bargain and agreement, so, as to him, there appears to be nothing illegal done by him. But we are all clearly of opinion that the whole of the transaction is to be considered as one entire agreement; for, the bond and note are both dated upon the same day, for payment of the same sum of money on the same day; the manner of the transaction was, to gild over and conceal the truth: and, whenever courts of law see such attempts made to conceal such wicked deeds, they will brush away the cobweb varnish, and show the transactions in their true light. This is an agreement to stifle a prosecution for wilful and corrupt perjury,—a crime most detrimental to the commonwealth; for it is the duty of every man to prosecute, appear against, and bring offenders of this sort to justice. Many felonies are not so enormous offences as perjury; *and, therefore, to stifle a prosecution for perjury seems to be a [*111 greater offence than compounding some felonies. The promissory note was certainly void: what right, then, had the plaintiff to recover upon this bond, which was given to indemnify him from a note that was void? They are both bad, the consideration for giving them being wicked and unlawful." So, in *Keir v. Leeman*, 6 Q. B. 308, it was held, that no agreement can be valid that is founded on the consideration of stifling a prosecution for an offence of a public nature. Although, therefore, the party injured may lawfully compromise an indictment for a common assault, an agreement to pay the costs of a prosecution for assault on the plaintiff and a riot, and of an action for a wrongful levy under a *fi. fa.*,—which agreement was founded partly on compromise of the prosecution, and partly on an undertaking to withdraw the execution under the *fi. fa.*,—is altogether invalid, as grounded on an illegal consideration; and this notwithstanding the compromise of the prosecution was entered into with the leave of the judge before whom the indictment

came on for trial. Lord DENMAN, in delivering the judgment of the court, there says: "The principle of law is laid down by WILMOT, C. J., in *Collins v. Blantern*, that a contract to withdraw a prosecution for perjury, and consent to give no evidence against the accused, is founded on an unlawful consideration, and void. On the soundness of this decision, no doubt can be entertained, whether the party accused were innocent or guilty of the crime charged. If innocent, the law was abused for the purpose of extortion; if guilty, the law was eluded by a corrupt compromise, screening the criminal for a bribe." Here, the corrupt agreement was the only consideration for the making of the note: and there was no necessity to aver that Mary Jones had notice of it. [COLTMAN, J. It is quite consistent with this plea, that the note was given to Mary Jones, in satisfaction of a just debt, and without any knowledge on her part that any illegality had occurred.] [*112]

Fortescue, in reply, was stopped by the court.

COLTMAN, J. It seems to me that neither of these pleas affords any defence. [*Prentice* here interposed, asking leave to amend: but the court held him too late.] The fifth plea alleges that the note was obtained from the defendant by one George Bromfield, and others in collusion with him, by fraud and covin practised on the defendant by Bromfield and the others; and that there was no consideration for the endorsement by Mary Jones to Vincent, or by Vincent to the plaintiff. This plea is bad in substance, for not showing that the note might not have been delivered over by the defendant to Mary Jones upon a good consideration. Although a fraud might have been practised on the defendant, it is not alleged that Mary Jones was a party to or cognisant of such fraud. A promissory note, like a bill of exchange, is a contract of a peculiar nature: a party who has himself no good title, may yet transfer a good title to another. The plea contains an averment that there never was any value or consideration for the endorsement of the note by Mary Jones to Vincent, or for the endorsement by him to the plaintiff, or for Vincent or the plaintiff being the holder of the said note. But it is not alleged that there was no consideration for the delivery of the note to Mary Jones, who, for anything that appears, may have been a holder for value, without fraud. For these reasons, I am of opinion that the plaintiff is entitled to judgment on the demurrer to the fifth plea, as well as upon all the other demurrers.

The rest of the court concurring,

Judgment for the plaintiff.

***WILLIAM CATTERALL, Administrator of ANN CATTERALL, v. LEES. June 19. [*113**

The general traverse *de injuriâ* can be replied to those pleas only which show that the plaintiff had not at any time a cause of action against the defendant.

DEBT, for money lent by Ann Catterall, in her lifetime, to the defendant, and for money found due from the defendant to Ann Catterall upon an account stated, &c.

Plea,—as to the sum of 150*l.*, parcel of the moneys in the declaration mentioned,—that, after the contracting of the said debts, and the accruing of the causes of action, in the declaration mentioned, and in the lifetime of the said Ann Catterall, to wit, on, &c., the defendant made his promissory note in writing, bearing date, to wit, the day and year aforesaid, and thereby promised to pay to the said Ann Catterall, or order, 150*l.*, with lawful interest for the same, on demand; that the defendant then delivered the said note to the said Ann Catterall, and the said Ann Catterall then accepted and received the said note of and from the defendant, for and on account of the said sum of 150*l.*, parcel, &c., and all causes of action in respect thereof; that, afterwards, and before the commencement of this suit, to wit, on the day and year aforesaid, the said Ann Catterall endorsed the said note in blank, and afterwards, to wit, on the day and year aforesaid, lost the same out of her possession; that the said note still continued and remained lost; and that the plaintiff was not, as administrator as aforesaid, at the time of the commencement of this suit, nor was he then, the holder, or possessed, of the said note, nor had he ever found the same,—verification.

To this plea, the plaintiff replied that the defendant, *without the cause by him in his said plea alleged, neglected to, and did [*114 not, pay the said sum of 150*l.*, parcel as aforesaid, or any part thereof, in manner and form as the plaintiff had above thereof complained against him,—concluding to the country.

Special demurrer, assigning for causes,—that the said replication was double and multifarious, in this, to wit, that it not only put in issue the delivery of the note in the plea mentioned to the said Ann Catterall, and the acceptance and receipt of the said note by her for and on account of the said sum of 150*l.*, parcel, &c., but also the allegation that the note was endorsed by Ann Catterall, and was lost by her after the same had been so endorsed, and also the allegation that the plaintiff was not the holder of the note at the time of the commencement of the suit;—that the plea consisted of matter in discharge of the cause of action in the introductory part of the plea mentioned, or it consisted of facts which went to show that the right of action in respect of the causes of action in the introductory part of the plea mentioned, was suspended by facts which occurred subsequently to the vesting of such right of action, and did not contain any matter which went to show that the defendant was

excused from paying the debt in the introductory part of the plea mentioned;—and that the replication ought to have traversed or denied some one or more of the material facts stated and set forth in the plea, in express words, &c.

Joinder in demurrer.

James, in support of the demurrer. The general replication *de injuriâ* is inapplicable here. The fallacy is, in confounding an exemption from liability existing at the time of the act done, with an exemption from liability at the time of the action brought. *De injuriâ* can only be replied where the plea sets up matter *existing at the time of
*115] the act done which gives a *prima facie* and apparent cause of action. The defendant, by his plea, does not say, that, at the time at which the cause of action is alleged to have accrued, he was not liable: he admits the cause of action, and sets up matter of subsequent discharge.

Kennedy, *contrâ*. The plea does not allege that the bill was given in discharge of the debt as to which it is pleaded: it is rather a suspension of the remedy.

MAULE, J. The replication *de injuriâ* is only applicable to a plea which shows that the plaintiff never at any time had a cause of action against the defendant.

Kennedy prayed leave to amend.

Per Curiam. The plaintiff may amend on the usual terms.

Rule accordingly.

SARAH THOROGOOD, Administratrix of CHARLES ABRAHAM
THOROGOOD, v. BRYAN.

CATTLIN v. HILLS and Others. June 20.

One who sustains an injury from a collision with a carriage or a vessel, cannot maintain an action against the owners of such carriage or vessel, if negligence either on his own part, or on the part of those having the guidance of the carriage or vessel in which he is a passenger, conduced to the accident, and such injury might have been avoided by the exercise of reasonable care on his part or their part.

THE first of these was an action upon the case brought by the plaintiff Sarah Thorogood, as administratrix of her late husband, Charles Abraham
*116] Thorogood, under the statute 10 Vict. c. 93, to recover *damages against the defendant for negligently causing the intestate's death.

The declaration stated that Charles Abraham Thorogood, in his lifetime, and before the committing of the grievances thereafter mentioned, was lawfully passing along a certain public highway; that the defendant, at the time of the committing of the grievance, was possessed of a certain carriage, called an omnibus, and of two horses then drawing the same along the said highway, which said carriage and horses were under the

care and direction of a certain servant of the defendant: yet that the defendant, after the passing of a certain act of parliament made and passed, &c., intituled "An act to compensate the families of persons killed by accident," to wit, on, &c., by her said servant, so carelessly drove and directed the said carriage and horses, that, by the negligence and improper conduct of the defendant, by her said servant, in that behalf, they ran against the said Charles Abraham Thorogood, so then lawfully passing along the said highway, and knocked him down, and passed over him, and thereby greatly crushed and injured him; and, by reason of the premises, the said Charles Abraham Thorogood, within twelve calendar months next before the commencement of the suit, to wit, on, &c., died, leaving him surviving the plaintiff, who at the time of his death, was his wife, and John, Sarah, Esther, and Emma, his children, &c., &c.

The defendant pleaded not guilty, whereupon issue was joined.

The cause was tried before V. WILLIAMS, J., at the sittings in Middlesex, after Trinity term, 1848. The facts that appeared in evidence were as follows:—On the 3d of January, 1848, Charles Abraham Thorogood, the husband of the plaintiff (whose administratrix she was), was a passenger in an omnibus belonging to one Barber, in which he was proceeding towards Clapton, about eight o'clock in the evening. The defendant, *Mrs. Bryan, was the proprietress of another omnibus [*117 running on the same line of road. Both vehicles had started together, and frequently passed each other, as either stopped to take up or set down a passenger. The deceased, wishing to alight, did not wait for the omnibus to draw up at the kerb, but got out whilst it was in motion, and far enough from the path to allow another carriage to pass on the near side. The defendant's omnibus coming up at the moment, the deceased was unable to get out of the way, and was knocked down and run over, and, seven days afterwards, died of the injuries he so sustained.

On the part of the defendant, it was submitted,—upon the authority of *Butterfield v. Forrester*, 11 East, 60, and *Bridge v. The Grand Junction Railway Company*, 3 M. & W. 244, S. C. per nom. *Armitage v. The Grand Junction Railway Company*, 6 Dowl. P. C. 340,—that the plaintiff was not entitled to recover, inasmuch as the evidence showed that the accident was, at least in part, occasioned by the negligence of the driver of Barber's omnibus, in permitting a passenger to alight without drawing up at the kerb, and whilst the vehicle was in motion, and by want of care and caution on the part of the deceased himself.

The learned Judge told the jury, that, if they were of opinion that the injuries sustained by the deceased were purely the result of accident, they must find for the defendant: and he further told them, that, if they were of opinion that want of care on the part of the driver of Barber's omnibus in not drawing up to the kerb to put the deceased down, or any want of care on the part of the deceased himself, had been conducive to the

injury, in either of those cases,—notwithstanding the defendant (by her servant) had been guilty of negligence,—their verdict must be for the defendant.

*118] *The jury returned a verdict for the defendant.

Humfrey, in Trinity Term, 1848, obtained a rule nisi for a new trial, on the ground of misdirection. He submitted that the ruling of the learned Judge would necessarily lead to this absurd result,—that a passenger who is injured by a collision between two omnibusses has no remedy against the proprietor of either, if the drivers of both are guilty of negligence or improper conduct. And he cited *Lynch v. Nurdin*, 1 Q. B. 29, 4 P. & D. 672, *Pluckwell v. Wilson*, 5 C. & P. 375, and *Luxford v. Large*, 5 C. & P. 421.

Talfourd, Serjt., now showed cause. The direction of the learned Judge was perfectly correct. The true principle which governs these cases, is to be found in the statement of the cause of action in the declaration,—which, in substance, is, that the injury was the result solely of negligence and improper conduct on the part of the defendant's servant. The question is, whether the injury of which the plaintiff complains, proceeded from negligence on the part of the defendant, or from something over which the defendant had no control. Many cases might be put, in which a party, though himself in fault, might still be entitled to compensation for damage sustained through another's negligence: for instance, suppose a drunken man lying in a carriage-way, and a carriage recklessly driven along the road, passed over and injured him,—the inebriety of the plaintiff would be no defence to an action. The true inquiry is—whether the injury complained of is fairly attributable to the wrongful act of the defendant. *Butterfield v. Forrester* was the first case in which this doctrine was discussed. It was there held, that one who is injured by

*119] an obstruction in a highway against *which he fell, cannot maintain an action, if it appear that he was riding with great violence and want of ordinary care, without which he might have seen and avoided the obstruction. “A party,” says Lord ELLENBOROUGH, “is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right.” [V. WILLIAMS, J. The objection to the summing up applies to that part of it which relates to the want of care and caution on the part of the driver of Barber's omnibus. I acted upon the *dictum* of the Court of Exchequer in *Bridge v. The Grand Junction Railway Company*: if that be correct, I was right.] That was an action upon the case for the negligent management of a train of railway carriages, whereby it ran against another train, in one of the carriages of which the plaintiff was, and injured him. The defendants pleaded that the parties having the management of the train in which the plaintiff was, managed it so negligently and improperly, that, *in part* by their negligence, the defendant's train ran against the other, and caused the injuries

to the plaintiff. The court held the plea bad, both in form and in substance. And PARKE, B., says: "The rule of law is laid down with perfect correctness in the case of *Butterfield v. Forrester*; and that rule is, that, although there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover: if by ordinary care he might have avoided them, he is the author of his own wrong. That is the only way in which the rule as to the exercise of ordinary care, is applicable to questions of this kind." That case is followed by *Davies v. Mann*, 10 M. & W. 546. *There, the defendant negligently drove his horses and wagon against, and [*120 killed, an ass, which had been left in the highway fettered in the fore feet, and thus unable to get out of the way of the wagon, which was going at a "smartish" pace along the road: and it was held that the jury were properly directed, that, although it was an illegal act on the part of the plaintiff so to put the animal on the highway, the plaintiff was entitled to recover. And PARKE, B., said, "This subject was fully considered by this court in *Bridge v. The Grand Junction Railway Company*, where, as appears to me, the correct rule is laid down concerning negligence, viz., that the negligence which is to preclude a plaintiff from recovering in an action of this nature, must be such as that he could, by ordinary care, have avoided the consequences of the defendant's negligence. In that case, there was a plea imputing negligence on both sides: here, it is otherwise; and the judge simply told the jury, that the mere fact of negligence on the part of the plaintiff in leaving his donkey on the public highway, was no answer to the action, unless the donkey's being there was the immediate cause of the injury: and that, if they were of opinion that it was caused by the fault of the defendant's servant in driving too fast, or, which is the same thing, at a smartish pace, the mere fact of putting the ass upon the road would not bar the plaintiff of his action. All that is perfectly correct; for, although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road." [CRESSWELL, J. Must not the negligence which is to exonerate the defendant, be *negligence of the plaintiff or of his agent?] It is submitted, [*121 not: at all events, the driver of the omnibus in which the deceased was a passenger, must be taken to be his agent. [CRESSWELL, J. Suppose two omnibusses are racing, and one of them runs over a man who is crossing the road, and has not time to get out of the way,—has not the injured party a remedy against the proprietor of either omnibus?] No doubt he has. [CRESSWELL, J. It seems strange to say that A. shall not be responsible for his negligence, because B. has been negligent like-

wise,—C. being the party injured. The principle of *Butterfield v. Forrester*, is, that one who receives an injury from the negligent act of another, shall not have an action, if by the exercise of ordinary care he might have escaped the injury.] It is not necessary in this case to contend for a proposition so wide as that suggested. The point did not arise in *Bridge v. The Grand Junction Railway Company*. [CRESSWELL, J. It could not: the plea amounted to not guilty, or nothing.]

Humfrey (with whom was *Cobbett*), in support of the rule. *Bridge v. The Grand Junction Railway Company* does not apply: it was enough there to decide that the plea was bad in point of form: but the court go on to say, unnecessarily, that it is also bad in substance. Adopting the suggestion of PARKE, B., in that case, the learned judge, upon this occasion, told the jury, that, if, in their opinion, the accident might have been avoided by the exercise of ordinary care on the part of the deceased, or of the driver of the omnibus in which he was, the defendant was entitled to their verdict. [CRESSWELL, J. It appears that the deceased got out whilst the omnibus was moving; and, consequently, he had not sufficient command of his legs to be able to get out of the way of the de-
*122] fendant's omnibus, the driver of which could not reasonably be expected to be prepared for such a state of things.] If the fact

were so, no ordinary care on Thorogood's part could have saved him. [CRESSWELL, J. What degree of caution could have enabled the driver of Barber's omnibus to avoid the accident?] It is enough to show that there might be a state of things which makes the direction wrong. We may assume that the deceased was in the right, and the drivers of both omnibusses wrong. [CRESSWELL, J. Wrong in what?] *In omnibus*. It would be monstrous to say that the plaintiff is without remedy against either party. Put the case of a passenger on board a steamboat, sitting in a place appropriated for passengers, and getting his leg broken by another steamboat coming in collision with them,—what remedy would he have against the proprietors of the boat he was on board of? [V. WILLIAMS, J. A coachman is responsible to his master for the due management of the carriage in which he is driven by him. Suppose the master injured by the coachman's want of care, though by an accident which would not have happened, but for the want of proper care on the part of a third person,—would the coachman be liable?] It is submitted that he would. The rule as laid down in *Butterfield v. Forrester*, and followed in *Bridge v. The Grand Junction Railway Company*, and *Davies v. Mann*, is not so large as the summing up in this case assumes. The negligence, to operate an excuse, must be negligence in the particular thing which leads to the accident.

The court, before pronouncing judgment in this case, desired to hear the argument of *Cattlin v. Hills and Others*, a case involving very much the same question.

Cur. adv. vult.

*CATTLIN v. HILLS and Others.

[*123]

THIS was an action upon the case brought by the plaintiff, who carried on the business of a seal-engraver, to recover damages from the defendants, the registered owners of the "Diamond" Gravesend steamboats, for an injury sustained by him whilst a passenger on board another steam-vessel, in consequence of alleged negligence on the part of the servants of the defendants.

The cause was tried before CRESSWELL, J., at the sittings at Westminster, after Michaelmas term, 1848. The facts were as follows:—The plaintiff was a passenger on board a vessel called the Sons of the Thames, which left London Bridge, for Gravesend, at nine o'clock in the morning. Having arrived off Northfleet Point, the Sons of the Thames was overtaken by the defendant's vessel the Sapphire. Both vessels being on the Essex side, and both wishing to cross to Rosherville Pier, the master of the Sapphire, in consequence, as it was said, of the Sons of the Thames having driven her too far on the Essex side, was compelled, in order to avoid overshooting the pier, to port her helm; and, when about two-thirds across, she rubbed against the Sons of the Thames, and, coming in contact with the anchor of the latter, which projected a little over her larboard bow, knocked it down upon the plaintiff's leg, and so crushed it as to render amputation necessary.

There was contradictory evidence as to whether or not the anchor on board the Sons of the Thames was properly stowed; the defendants contending that it ought to have been lashed, in which case the accident could not have happened.

The learned judge told the jury that the plaintiff was not entitled to recover, if they were of opinion that *the damage sustained by the plaintiff had been occasioned by negligence on the part of those intrusted with the conduct and management of the Sons of the Thames; but that they must dismiss from their minds all that had been said about the stowing of the anchor, for that the plaintiff would be entitled to a verdict, even though they should think the anchor had improperly been left unfastened. [*124]

The jury, under this direction, returned a verdict for the plaintiff, damages 900*l*.

Montagu Chambers, in Hilary term last, moved for a new trial, on the ground of misdirection, that the verdict was against evidence, and that the damages were excessive. *Butterfield v. Forrester*, 11 East, 60, *Bridge v. The Grand Junction Railway Company*, 3 M. & W. 244, *Davies v. Mann*, 10 M. & W. 546, and *Luxmore v. Large*, 5 C. & P. 421, are distinct authorities to show that the action will not lie, where the injury is in part attributable to the negligence or want of due care and caution of the plaintiff, or of those having the management and control

of the carriage, train, or vessel in which he was being conveyed. The way in which the anchor was stowed was clearly a part of the management of the vessel, and ought not to have been withdrawn from the consideration of the jury. [CRESSWELL, J. I certainly took that upon myself. There was no evidence as to the duty or the necessity of having the anchor lashed in that part of the river where the accident happened. The harbour-master gave very strong evidence that it was neither necessary nor usual. MAULE, J. Suppose the anchor was negligently and improperly stowed by the owners of the Sons of the Thames, and, in consequence of that negligence, *and also* in consequence of negligence on the *125] *part of those navigating the Sapphire, the plaintiff,—an innocent third party,—was injured; against whom must he seek redress?] He would have a clear right of action against the owners of the Sons of the Thames, who were bound by their contract to convey him safely. But it by no means follows that he has also a right of action against the owners of the Sapphire, whose only fault is, that they accidentally struck against something on board the other vessel, which was placed where it ought not to have been.

It was clear, from the evidence on both sides, that the two vessels were struggling each to get first into Rosherville. The Sons of the Thames having pressed the Sapphire on to the Essex shore beyond the point where, according to the proper course of navigation, she should have turned off to cross the river, the latter vessel was compelled to keep her helm ported, or she would have gone beyond the Rosherville Pier. There was no collision: the vessels merely grazed each other; and no injury could have occurred, but for the improper stowage of the anchor. [CRESSWELL, J. I thought it was an open question for the jury. They probably thought it fair racing on the part of the Sons of the Thames, and jostling on the part of the Sapphire.]

The damages were clearly excessive. It is true, the plaintiff sustained the severe inconvenience of losing a leg; but that does not very much interfere with the means of living of a man of his trade. [MAULE, J. 500*l.* was in one case held not to be an excessive sum for merely holding a stick over the plaintiff.(a) CRESSWELL, J. I certainly am not dissatisfied with the verdict. The amount of damages was for the jury.]

WILDE, C. J. Upon the first point,—which is one of very general *126] importance, and of some nicety,—we *think the rule may go. As to the second, there was evidence on both sides, and the judge reports himself not dissatisfied with the verdict: under these circumstances, we cannot interfere. The damages are so peculiarly within the province of the jury, that it is only under very particular circumstances that a motion on the ground of excess can be entertained. The loss of a leg is certainly a very serious thing, and one deserving of large compensation. The rule, therefore, will go upon the ground of misdirection only.

(a) Per HENRY, J., in *Morest v. Harvey*, 5 Taunt. 442, 1 Marsh. 139.

Wilkins, Serjt., *R. Miller*, and *Wordsworth*, now showed cause. They submitted that the rule laid down in *Butterfield v. Forrester*, and since extended to the case of servants and agents under the immediate control of the party, was inapplicable to persons travelling by public conveyances, over the management of which they have no control. And they referred to *Sills v. Brown*, 9 C. & P. 601, *Smith v. Dobson*, 3 M. & G. 59, 3 Scott, N. R. 836, *Davies v. Mann*, 10 M. & W. 546, *Lynch v. Nurdin*, 1 Q. B. 29, 4 P. & D. 672, and *Bridge v. The Grand Junction Railway Company*, 3 M. & W. 244, and to the observations upon the last-mentioned case, in the notes to *Ashby v. White*, 1 Smith's Leading Cases, 8d edit., by Keating and Willes, p.*132 a, where the learned annotators say:—"A hasty perusal of the report of that case might lead to the supposition, that, according to the opinion of the court, the plea might have been made good in substance, though not in form, by an averment that the plaintiff's driver could, by ordinary care, have avoided the accident: but that result does not by any means follow from what the learned judges said, much less from what they actually decided. It may, perhaps, *safely be asserted that the plea was at all events bad in substance, [*127 for not alleging that *the passenger* who brought the action was guilty of negligence. If two drunken stage-coachmen were to drive their respective carriages against each other, and injure the passengers, each would have to pay for his own carriage, no doubt; but it is inconceivable that each set of passengers should, by a fiction, be identified with the coachman who drove them, so as to be restricted for remedy to actions against their own driver or his employer."

M. Chambers and *Bramwell*, in support of the rule. It must now be assumed that the *Sapphire* was negligently navigated, so as to produce a collision with the *Sons of the Thames*: but it is not so clear that the displacement of the anchor on board the latter vessel, was *wholly* attributable to the negligence of the crew of the former. The accident occurred, partly in consequence of the collision, and partly in consequence of the improper stowage of the anchor. This latter cause, therefore, should not have been withdrawn from the attention of the jury; it was a most important ingredient for their consideration. [MAULE, J. You must say that the allegation in a special plea that the plaintiff was contributory to the accident, would be sustained by showing that there was negligence on the part of those having the management of the *Sons of the Thames*, and that the plaintiff was a passenger therein.] Precisely so. If there has been any negligence conducive to the injury, on the part of those whom he employs to carry him, the plaintiff cannot complain of negligence on the part of the defendants. In *Flower v. Adam*, 2 Taunt. 314, it was held, that, if the proximate cause of damage be the plaintiff's unskilfulness, although the primary cause be the misfeasance of the defendant, the plaintiff cannot recover: *at least, if the [*128 mischief be in part occasioned by the misfeasance of a third per-

son not sued. There, A. placed lime-rubbish in a highway, the dust blown from it frightened the horse of B., and nearly carried him into contact with a passing wagon, in avoiding which he unskilfully drove over other rubbish placed in the road by C., and was overthrown and hurt: it was held, that, upon a count stating these facts, B. could not recover against A. The question there left to the jury, as well as in *Davies v. Mann*, was, to whose want of care was the proximate cause of the injury attributable. In *Sills v. Brown*, 9 C. & P. 601, a brig was carrying her anchor in a position contrary to the by-laws of the river Thames, at the time when she came in collision with a barge; and it was held that the improper carrying of the anchor, would not, of itself, be sufficient to make the owner of the brig responsible in damages, if the barge, by departing from the known rule of the river, brought herself into the situation in which the brig struck her, although, but for the position of the anchor, the collision would not have produced the injury complained of. COLERIDGE, J., in his summing up, told the jury, that, "if it was a pure accident, or if the plaintiff's servants substantially contributed to the injury, by their improper or negligent conduct, the defendant would be entitled to their verdict; but that, on the contrary, if the injury was occasioned by the improper or negligent conduct of the defendant's servants, and the plaintiff's servants did not substantially contribute to produce it, then the plaintiff would be entitled to their verdict." One of the jury asked the learned judge whether he had not told them that the way in which the anchor was placed had nothing to do with the question: to which his lordship answered,—“No. You must *129] have misunderstood my *observations, if that was the impression you received. The position of the anchor will not be sufficient to make the defendant liable, if the plaintiff, by his servants, substantially contributed to the occurrence of the injury, *not to its amount*, but to the occurrence of it. The plaintiff says, that, if the anchor had not been in the position in which it was, no injury would have occurred at all; but that would not make the defendant liable, if the people on board the plaintiff's barge brought it by improper or careless navigation into the position in which it received the injury.” Here, the learned judge withdrew from the jury what COLERIDGE, J., in that case, put most prominently before them. It can hardly be said that the injured party could maintain separate actions against the proprietors of each vessel: he could not urge, as against each, that the injury was occasioned by *his* negligence *alone*. [MAULE, J. When a man has a wrong done to him by several tort-feasors, he clearly has a right of action against *some* of them.] No doubt. But, if this action be maintainable, the present defendants will, in truth, be paying damages for the negligence of the owners of the other vessel, as well as for their own negligence. [CRESSWELL, J. Though not lashed, the anchor would have done no harm, but for the default of the defendants. Admitting that the anchor ought to

have been lashed, if the collision arose through the default of the defendants, without any fault on the part of the plaintiff, or the vessel he was in, the defendants are liable.] There can be no difference in degree of negligence between an improper stowage of the anchor, and improperly porting the helm.(a)

COLTMAN, J. The case of *Thorogood v. Bryan* seems distinctly to raise the question whether a passenger *in an omnibus is to be considered so far identified with the owner, that negligence on the part of the owner or his servant is to be considered negligence of the passenger himself. As I understand the law upon this subject, it is this,—that a party who sustains an injury from the careless or negligent driving of another, may maintain an action, unless he has himself been guilty of such negligence or want of due care as to have contributed or conduced to the injury. In the present case, the negligence that is relied on as an excuse, is, not the personal negligence of the party injured, but the negligence of the driver of the omnibus in which he was a passenger. But it appears to me, that, having trusted the party by selecting the particular conveyance, the plaintiff has so far identified himself with the owner and her servants, that, if any injury results from their negligence, he must be considered a party to it. In other words, the passenger is so far identified with the carriage in which he is travelling, that want of care on the part of the driver will be a defence of the driver of the carriage which directly caused the injury.(b) That being so, the summing up in this case,—which is in accordance with the opinion expressed by the Court of Exchequer in *Bridge v. The Grand Junction Railway Company*, though not in terms with the decision of that case,—was correct. I therefore think the verdict should stand undisturbed.

With regard to the case of *Cattlin v. Hills*, that gives rise to a further point, upon which we are desirous of taking some little time for deliberation.

MAULE, J. I agree with my brother COLTMAN in thinking that the rule in *Thorogood v. Bryan* ought to *be discharged. This is an action brought to recover damages against an omnibus proprietor, for negligently causing the death of the plaintiff's husband, by knocking him down and driving over him as he had just alighted from another omnibus. My brother WILLIAMS, in leaving the case to the jury, told them, that, if they should be of opinion that the occurrence was purely accidental, or that the deceased, or the driver of the omnibus by which he was carried, had by any negligence or want of care on their part contributed to the accident, they must find for the defendant. The jury having, upon that direction, found for the defendant, it must be assumed that they found that there had been negligence on the part of the driver

(a) And see *Hullman v. Bennett*, 5 Esp. N. P. C. 226, and *Vanderplank v. Miller*, M. & M. 169.

(b) This seems to be the supposition which the learned editors of the third edition of *Smith's Leading Cases* (*supra*, p. 126) designate as "inconceivable."

of the omnibus in which he was a passenger. This case is an important one, inasmuch as it is in some degree novel, though somewhat similar in principle to *Bridge v. The Grand Junction Railway Company*, where, in case against a railway company for the negligent management of a train, whereby it ran against another train in which the plaintiff was a passenger, and injured him, a plea that the persons having the management of the train in which the plaintiff was, managed it so negligently and improperly, that, *in part by their negligence*, the defendants' train did the mischief,—was held bad. The Court of Exchequer there seem to have thought,—though it was not necessary to decide it,—that, where there is negligence on both sides, the action cannot be maintained. Although I at one time entertained a contrary impression, upon further consideration I incline to think, that, for this purpose, the deceased must be considered as identified with the driver of the omnibus in which he voluntarily became a passenger, and that the negligence of the driver was the negligence of the deceased. If the deceased himself had been driving, the case would have been quite free from doubt. So, *132] there could have been no doubt, had the driver been employed to drive him, and no one else. On the part of the plaintiff, it is suggested that a passenger in a public conveyance has no control over the driver. But I think that cannot with propriety be said. He selects the conveyance. He enters into a contract with the owner, whom, by his servant the driver, he employs to drive him. If he is dissatisfied with the mode of conveyance, he is not obliged to avail himself of it. According to the terms of his contract, he unquestionably has a remedy for any negligence on the part of the person with whom he contracts for the journey. It is somewhat remarkable that actions of this sort are almost invariably brought against the rival carriage or vessel,—which is only to be accounted for by that party spirit which more or less enters into every transaction of life. If there is negligence on the part of those who have contracted to carry the passengers, those who are injured have a clear and undoubted remedy against them. But it seems strange to say, that, although the defendant would not, under the circumstances, be liable to the owner of the other omnibus for any damage done to his carriage, he still would be responsible for an injury to a passenger. The passenger is not without remedy. But, as regards the present defendant, he is not altogether without fault. He chose his own conveyance, and must take the consequences of any default of the driver whom he thought fit to trust. For these reasons, it seems to me that the direction of my brother WILLIAMS was quite correct, and that the rule should be discharged.

CRESSWELL, J. I am of the same opinion. I must own I should not have been sorry if the point could have been raised upon a bill of exceptions. The *subject is an important one, and ought to be *133] definitively set at rest. I incline to think that the opinion

thrown out by the Court of Exchequer in *Bridge v. The Grand Junction Railway Company*, is the correct one. If the driver of the omnibus the deceased was in, had, by his negligence, or want of due care and skill, contributed to any injury from a collision, his master clearly could maintain no action. And I must confess I see no reason why a passenger who employs the driver to convey him, stands in any better position. For these reasons, I think the plaintiff in this case was not entitled to recover.

V. WILLIAMS, J. I am of the same opinion. I think the passenger must, for this purpose, be considered as identified with the person having the management of the omnibus he was conveyed by.

Rule discharged.(a)

Cur. adv. vult.

As to *Cattlin v. Hills*,

On Monday, the 25th of June, 1849, the Court were prepared to give judgment in this case,—*discharging the rule*, as it was understood,—but they were informed that the parties had agreed to a compromise: consequently, no judgment was given.

(a) See the cases upon this subject collected and carefully arranged in *Oliphant on Horses and Gaming*, pp. 157 *et seq.*

*WORTHINGTON v. WARRINGTON. June 21. [*134

A. entered into possession of premises under an agreement with B., under which he was to hold them as tenant for two years, at the yearly rent of 50*l.*, with liberty to him to make, at his own expense, such alterations and additions to the premises as he might think proper, the same being improvements, and A. to have the option of purchasing the premises, at any time during the two years, for 600*l.*—"it being understood between the parties that B. was possessed of the premises for his own life and the life of C., and of the survivor of them." It being, however, discovered that B. had not the precise interest mentioned in the agreement, A. brought assumpsit to recover damages for the breach of contract, and also compensation for the money expended by him in improvements:—

Held, that he was only entitled to recover the value of the proposed lease, and not the value of the improvements.

THIS was an action of assumpsit. The declaration stated, that, on the 7th of November, 1844, by an agreement in writing of that date, the defendant agreed to let, and the plaintiff then agreed to take of the defendant, for two years from the 9th of October, 1844, at the rent of 50*l.* a year, the house, garden, &c., situate at Bromborough, in the county of Chester, then in the occupation of the plaintiff; and it was agreed that the plaintiff might, at his own expense, make such alterations and additions to the premises as he might think proper, the same being improvements; that the plaintiff should have the right of purchasing the said premises at the end of, or at any time during, the said term of two years, *it being then understood by and between the said parties that the defendant was possessed of the said premises for his own life and the life of*

one Mrs. Manwaring, and of the survivor of them: that, the agreement having been so made as aforesaid, in consideration thereof, &c., the defendant promised to perform the agreement; and that he was possessed of the said premises for his own life and for the life of the said Mrs. Manwaring, and that he, the defendant, would, if the plaintiff elected to purchase, according to the said agreement, make and deduce to the plaintiff a *135] good and *valid title to the said estate and interest of the plaintiff therein before mentioned in and to the said premises: Averment, that the plaintiff, confiding in the said agreement and promise of the defendant, did, to wit, on, &c., take possession of the said house, garden, &c., and enter into occupation thereof on the terms aforesaid, and that, during the said term, to wit, on, &c., he gave notice to the defendant that he elected to purchase the said premises for 600*l.*, according to the said agreement; and the plaintiff then requested the defendant to make him a good and valid title as mentioned in the said agreement: that, although a reasonable time had elapsed, before the suit, for the defendant to make a good and valid title, and the plaintiff had always been ready and willing to pay the purchase-money, and perform all other matters required of him, according to the said agreement; yet that the defendant wholly disregarded his promise, and was not, either at the time of making the said agreement, or within a reasonable time after he had notice of the plaintiff's election to purchase, or at any other time, possessed of the said premises, &c., according to the meaning of the said agreement, and the defendant did not nor would at any time make a good and valid title to such estate and interest in the said premises, according to the meaning of the said agreement,—by means whereof the plaintiff had been deprived of all the benefits which would have arisen to him from the completion of the said purchase: that the plaintiff, confiding in the said promise of the defendant, and intending to purchase the said premises, &c., according to the said agreement, did, during the said term, at his own expense, make alterations and improvements in the said premises, and, in so doing, incurred great expense, to wit, 1000*l.*, in and about the same alterations and improvements,—all which moneys were, by reason of the defendant's *136] breach of promise, *wholly lost to the plaintiff; and the plaintiff, by reason of the premises, was otherwise greatly damnified, &c.

The defendant pleaded,—non assumpsit,—that the defendant was possessed of the premises for his own life and the life of Mrs. Manwaring, &c.,—and that he did, within a reasonable time, make a good title, &c.

The cause was tried before WILDE, C. J., at the summer assizes at Chester, in 1848. It appeared that the plaintiff took possession of the premises at the date of the agreement set out in the declaration, and immediately, and without any notice to the defendant, commenced making extensive alterations and improvements thereon, which were completed in the summer of 1845, at a cost of about 400*l.*; and that, on the 2d of

June, 1846, he gave the defendant notice of his intention to exercise the option of purchasing his interest in the premises. It turned out, upon an investigation of the defendant's title, that he had not the precise interest stated in the agreement, but that he was entitled to the premises for the life of Mrs. Manwaring, and for sixty-one years beyond. The plaintiff thereupon refused to complete the purchase, and brought this action to recover compensation, as well for the defendant's breach of contract, as for the expense he had incurred in improving the premises.

The learned judge told the jury that "improvements" meant "improvements with reference to pecuniary value:" and he propounded two questions to them,—first, what was the value of a lease such as the defendant by his contract professed to sell, *without* the improvements, on the day on which the plaintiff intimated his intention to take the lease, viz. on the 2d of June, 1846?—secondly, what was the value of the lease, on the same day, *with* the improvements?

In answer to the first question, the jury found that the value was 40s.; and to the second, that the lease was worth 100l. A verdict was thereupon entered for *the plaintiff for 102l., subject to leave to the [*137 defendant to move to reduce it to 40s., if the court should be of opinion that the plaintiff was not entitled to recover in respect of the money expended by him upon the improvements.

Welsby, in Michaelmas term, 1848, accordingly obtained a rule nisi. He referred to *Flureau v. Thornhill*, 2 Sir W. Blac. 1078,(a) and *Hopkins v. Grazebrook*, 6 B. & C. 31, 9 Dowl. & Ryl. 22.

Crompton and *Couch* now showed cause. As a general rule, one who sustains a loss by reason of a breach of contract for the sale of land, is entitled to damages to such extent as will place him in the same situation as he would have been in had the contract been duly performed. An exception was engrafted upon that rule by the case of *Flureau v. Thornhill*, where it was held that a contractor for a purchase of real estate, to which the title proves (without collusion) defective, is entitled to recover no satisfaction for the loss of his bargain. Lord Chief Justice DE GREY there says: "Upon a contract for a purchase, if the title proves bad, and the vendor is (without fraud) incapable of making a good one, I do not think that the purchaser can be entitled to any damages for the fancied goodness of the bargain which he supposes he has lost." And BLACKSTONE, J., says: "These contracts are merely upon condition, frequently expressed, but always implied, that the vendor has a good title. If he has not, the return of the deposit, with interest and costs, is all that can be expected." *Hopkins v. Grazebrook* introduces a further exception. There, a person who had contracted for the purchase of an estate, but had not obtained a *conveyance, put up the estate for [*138 sale in lots by auction, and engaged to make a good title by a certain day, which he was unable to do, as his vendor never made a con-

(a) And see *Bratt v. Ellis*, Sugd. V. & P. Appendix, No. VII.

veyance to him : and it was held, that a purchaser of certain lots at the auction, might, in an action for not making a good title, recover not only the expenses which he had incurred, but also damages for the loss which he sustained by not having the contract carried into effect. ABBOTT, C. J., says: "The defendant had, unfortunately, put the estate up to auction before he got a conveyance. He should not have taken such a step, without ascertaining that he would be in a situation to offer *some* title; and, having entered into a contract to sell, without the power to confer even the shadow of a title, I think he must be responsible for the damage sustained by a breach of his contract." And BAYLEY, J., says: "Where a vendor holds out an estate as his own, the purchaser may presume that he has had a satisfactory title; and, if he holds out as his own that which is not so, I think he may very fairly be compelled to pay the loss which the purchaser sustains by not having that for which he contracted." In *Walker v. Moore*, 10 B. & C. 416, A. having contracted with B. for the purchase of a real estate, the vendor, acting *bona fide*, delivered an abstract showing a good title; and A., before he examined it with the original deeds, contracted to re-sell several portions of the property, at a considerable profit. Upon a subsequent examination of the abstract with the deeds, A. discovered that the title was defective, and the sub-purchasers refused to complete their purchases, and he refused to complete his purchase from B., and brought an action, wherein he claimed, as damages, the expenses which he had incurred in the investigation of the title, the profit which would

*139] *have accrued from the re-sale of the property, the expense attending the re-sale, and the sums which he was liable to pay to the sub-contractors for the expenses incurred by them in examining the title. It was held that he was entitled to recover only the expenses that he had incurred in the investigation of the title, and nominal damages for the breach of contract, as no fraud could be imputed to the vendor. It is difficult to see how the question of *bona fides* can enter into the consideration of the vendee's rights. BAYLEY, J., there says: "The defendants undertook to make a good title, and they might honestly think that they should be able to do so. It turned out that they could not, and consequently the contract was broken, and they were liable to an action. The plaintiff, however, must show that the damages which he seeks to recover arose from the acts of the defendants, and not from his own haste. * * * If there were *mala fides* in the original vendor (but not otherwise), I am not prepared to say that the purchaser might not recover the profit which would have arisen from the re-sale. But, if premises for which a party has contracted are by him offered for re-sale too soon, that is at his own peril, and the damage, if any, resulting from such offer, arises from his own premature act, and not from the fault of his vendor." And LITLEDALE, J., says: "Where a contract for the purchase of land is made, each party cannot but know that the title may prove defective, and must be taken to proceed upon that know-

ledge." That case proceeded upon a ground which is not applicable here. All those cases are considered in *Robinson v. Harman*, 1 Exch. 850, where it was held, that, where a party agrees to grant a good and valid lease, having full knowledge that he has no title, the plaintiff, in an action *for the breach of such agreement, may recover, beyond [*140 his expenses, damages resulting from the loss of his bargain; and the defendant cannot, under a plea of payment of money into court, give evidence that the plaintiff was aware of the defect of title. "The rule of common law," says PARKE, B., "is, that, where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages, as if the contract had been performed. The case of *Flureau v. Thornhill* qualified that rule of the common law. It was there held that contracts for the sale of real estate, are merely on condition that the vendor has a good title; so, that, where a person contracts to sell real property, there is an implied undertaking, that, if he fail to make a good title, the only damages recoverable, are, the expenses which the vendee may be put to in investigating the title. The present case comes within the rule of the common law; and I am unable to distinguish it from *Hopkins v. Grazebrook*." And ALDERSON, B., says: "The damages have been assessed according to the general rule of law, that, where a person makes a contract, and breaks it, he must pay the whole damage sustained. Upon that general rule, an exception was engrafted by the case of *Flureau v. Thornhill*, and upon that exception the case of *Hopkins v. Grazebrook* engrafted another exception. This case comes within the latter, by which the old common law rule has been restored. Therefore, the defendant, having undertaken to grant a valid lease, not having any colour of title, must pay the loss which the plaintiff has sustained by not having that for which he contracted." In the present case, the expense incurred by the plaintiff in alterations and improvements, was matter which was in the contemplation of the parties at the time the contract was entered into. The real and only question is, *whether [*141 the consequential damages naturally and properly flowed from the defendant's breach of contract.

Welsby, in support of the rule. The stipulation as to the making of alterations and improvements, was introduced into the contract merely to prevent the tenant from being made liable for waste. Immediately upon the execution of the agreement in November, 1844, the plaintiff, without any notice to the defendant, proceeded to make extensive alterations; and it was not until they were completed, in June, 1845, that he gave any intimation of his intention to avail himself of the option to purchase the defendant's interest. The plaintiff cannot recover damages for any fancied loss or bargain. It is not necessary to contend upon the present occasion, that he is only entitled to nominal damages. The question is, whether the money the plaintiff has expended in improve-

ments constitutes a damage that naturally results from the defendant's breach of contract. In the case of goods, the only measure of damages would be the market value at the time of the breach. There is no reason why a different rule should prevail in the case of a sale of land.

COLTMAN, J. By this agreement, the plaintiff is to become tenant of the premises for two years, at a certain rent, with liberty to the tenant, at his own expense, to make such alterations and additions as he might think proper, the same being improvements; and the tenant to have the option, at the end of, or at any time during, the two years, to purchase the premises for a given sum. I think it would be extremely hard, if it were held that the plaintiff was at liberty at once to make alterations, and then to throw the expense of them upon the defendant in the event of his not being able to make a good title. Every one who purchases *land knows that difficulties may exist as to the making a title, *142] which were not anticipated at the time of entering into the contract. But, if the purchaser thinks proper to enter into possession, and to incur expenses in alterations, before the title is ascertained, he does so at his own risk. I see nothing in this case to distinguish it from the ordinary one. The plaintiff should have taken care to ascertain that the title was good, before he proceeded to lay out money upon the premises. The damages must be reduced to 40s.

The rest of the court concurring,

Rule absolute.

WILBY, a Pauper, v. ELSTON. June 21.

The words "You are living by imposture;" "You used to walk St. Paul's Church Yard for a living,"—spoken of a woman with the intention of imputing that she was a swindler and a prostitute,—are not actionable, without special damage.

In case for words not actionable *per se*, averring special damage, "not guilty" puts in issue not only the speaking of the words, but also the special damage alleged.

THIS was an action of slander. The first count of the declaration stated, that, before and at the time of the committing, &c., the plaintiff was an honest and respectable person, and possessed of divers acquirements of useful learning, and had always conducted herself with decorum, chastity, modesty, and propriety, and was intending, and about, and had publicly proposed, and was ready to receive, in a certain house in which she then resided with her mother, Maria Ann Wilby, widow, pupils to instruct in divers acquirements of useful learning, for certain reasonable reward to be paid to her in that behalf; yet the defendant, well knowing the premises, but contriving, &c., to injure the plaintiff in her good name, fame, and *143] credit, and to cause it to be believed *that she was unfit to receive such pupils, and to prevent her from obtaining any such, therefore, to wit, on the 24th of June, 1845, in a certain discourse which

he, the defendant, then had of and concerning the plaintiff, in the presence and hearing of divers good and worthy subjects of our Lady the Queen, did, in the presence and hearing of those persons, falsely and maliciously speak and publish of and concerning the plaintiff, the false, scandalous, malicious, and defamatory words following, that is to say, "They (meaning the plaintiff and the said Maria Ann Wilby, the mother of the plaintiff) came here, setting themselves up for ladies, and taking everybody in, and paid no one. They get their living by imposture, and going about with false petitions. They are nothing but impostors and swindlers. She (meaning thereby the plaintiff) used to walk St. Paul's Church Yard for her living (meaning thereby that the plaintiff did walk in and about St. Paul's Church Yard, in the city of London, as a common prostitute, for the purpose of getting her living by prostitution of her body); and that, by means of the committing of the said grievances by the defendant, the plaintiff had been prevented from obtaining and receiving divers pupils in the said house where she resided with her mother as aforesaid, which she otherwise would have obtained and received, and from obtaining and earning divers profits therefrom; and that divers persons, to wit, one Mary Tudor, one Harriett Harris, and one Henry Wetton, who were about to send, and, but for the committing of the said grievances by the defendant, would have sent, divers, to wit, nine children each, as pupils, to be instructed by the plaintiff in manner aforesaid, for certain reasonable remuneration and reward to be paid by each of the said parties to the plaintiff in that behalf, respectively wholly refused to send any of the said children to the plaintiff; and the plaintiff had, by means of the *premises, been, and was, deprived of [*144 all the reasonable remuneration and reward which she would otherwise have derived for the instruction of such children, and she had also, by means of the committing of the said grievances by the defendant, been shunned and avoided by, and deprived of the countenance and assistance of, divers persons who would otherwise have befriended and assisted her in the procuring of pupils for the purpose aforesaid, and especially of one Harriett Harris, one Henry Wetton, one Mary Tudor, and one Rev. John Curwin, who had, by means of the premises, been prevented from befriending and assisting her, in manner aforesaid.

There was a second count, charging the speaking of other words.

The defendant pleaded not guilty.

The cause was tried before COLTMAN, J., at the Essex summer assizes, 1848. The words proved to have been spoken, were,—“*You are living by imposture. You used to walk St. Paul's Church Yard for your living.*” *No special damage was proved.* The learned judge allowed the declaration to be amended, according to the proof.

The jury returned a verdict for the plaintiff on the first count, damages 5*l.*, saying that the charge intended to impute to the plaintiff that she was a *swindler* and a *prostitute*. Upon the second count, the verdict

was for the defendant. And leave was reserved to the defendant to move to enter a verdict for him on the first count also, if the court should be of opinion that the words proved were not actionable *per se*, and were not spoken of the plaintiff in the way of her profession or business.

Montagu Chambers, in Michaelmas term, 1848, obtained a rule nisi accordingly. He cited *Savile v. *Jardine*, 2 H. Blac. 531, and *145] *Robertson v. Powell*, Selw. N. P. 10th edit. 1248, n. (8), to show that the words "swindler" and "prostitute" are not actionable words *per se*; and submitted that the circumstance of the plaintiff's *intending* or being about to carry on a trade or profession, would not suffice to take the case out of the ordinary rule.

Dowdeswell now showed cause. The first count alleges, by way of inducement, that the plaintiff was about to receive pupils. The words proved to have been spoken were most offensive, and destructive of the undertaking contemplated, a reputation for morality being most essential to its success; though, after the *dictum* of TWISDEN, J., in *Wharton v. Brook*, 1 Ventris, 21, cited by Lord DENMAN, C. J., in giving the judgment of the court in *Ayre v. Craven*, 2 Ad. & E. 2, 4 N. & M. 220, it would be idle to contend that a charge of prostitution, in the absence of special damage, would entitle even a schoolmistress to maintain an action. The charge, however, that the plaintiff is a person getting her living by imposture, involves an accusation that she is a rogue and vagabond, and so liable to pains and penalties. [V. WILLIAMS, J. That is no stronger than saying that the plaintiff is a cheat, which clearly is not actionable.]

The special damage, then, being the gist of the action, is admitted, not being traversed. It was so ruled expressly by Lord ABINGER, C. B., in *Perring v. Harris*, 2 M. & Rob. 5. In *Smith v. Thomas*, 2 N. C. 372, 2 Scott, 546, TINDAL, C. J., says: "*Where the words are actionable in themselves*, it is not the gist of the action, but a consequence only of the *146] right of action. If the plaintiff proves his special damage, he *may recover it; if he fails in proving it, he may still resort to and recover his general damages. A traverse, therefore, of such an allegation, is immaterial and improper, as a finding upon it either way will have no effect as to the right to the verdict." In *Wylie v. Birch*, 4 Q. B. 566, 3 G. & D. 629, in case against the sheriff, the declaration alleged that a *fi. fa.* on a judgment recovered against P., issued, and was delivered to the defendant, who seized P.'s goods, and by sale thereof levied the sum endorsed on the writ, but did not render it to the plaintiff, and falsely returned that the goods remained in his hands for want of buyers: by means whereof the plaintiff lost the means of obtaining the money endorsed. The defendant pleaded three pleas, all alleging that the judgment was obtained on a warrant of attorney, and not on a *cognovit actionem* signed after declaration filed, nor in an adverse action. One of the pleas alleged that P. became a bankrupt, and a *fiat* issued against

him before the sale; and that an assignee was appointed. Another plea alleged that the plaintiff had notice of the bankruptcy before the sale, and the defendant before the return; and that the defendant, in his return, after stating that the goods remained in his hands for want of buyers, added that the assignees had claimed the goods. Another of the pleas alleged that the warrant of attorney was given to the plaintiff by way of fraudulent preference. On special demurrer, assigning for cause that the pleas were argumentative traverses of the defendant's being guilty of the grievances alleged, and omitted to show that the plaintiff had not sustained, and could not possibly sustain damage,—it was held, that the pleas were all good, as showing that the plaintiff had suffered no damage by the false return; that it was not necessary to aver expressly that no damage could possibly arise; and that they were not argumentative *pleas of not guilty, but negatived the suggestion of damage arising upon the defendant's admitted breach of duty. *Wright v. Newton*, 3 Scott, 595, and *Sutherland v. Pratt*, 11 M. & W. 296, also show that there may be a plea to special damage. And in *Robinson v. Marchant*, 7 Q. B. 918, 926, Lord DENMAN, C. J., says: "A plea to the damage only is bad, unless the damage is so essentially the cause of action that without it the action could not be maintained. Words spoken of a trader in the way of his trade, and imputing insolvency, are actionable in themselves. But it is argued, for the defendant, that the damage here complained of includes not only such as might accrue to the plaintiff alone, but the special damage which the firm is said to have sustained, and that the two cannot, for the present purpose, be distinguished. Whether this would have been a sufficient objection or not, on special demurrer to the declaration, it is not necessary to say. On a trial, the special damage might, and must, have been separated from the more general damage, and the jury, in their verdict, might have considered the last without the first." [MAULE, J., referred to *The Cross-Keys Bridge Company v. Rawlings*, 3 N. C. 71, 3 Scott, 400, where to a declaration for carelessly impinging with a ship against the plaintiffs' bridge, and thereby doing damage, the defendants pleaded, that the plaintiffs improperly narrowed the channel by an obstruction, without this that the damage was occasioned by the carelessness of the defendants; and it was held, that, under this plea, the defendants were entitled to give evidence in disproof of carelessness, after they had failed to establish the obstruction imputed to the plaintiffs.] The special damage is not the wrongful act complained of, and therefore is not put in issue by the plea of not guilty.

**M. Chambers and Bramwell*, in support of the rule. The point last urged was not made at the trial, and therefore it is not competent to the plaintiff to urge it now. (a) The special damage is clearly traversed by not guilty. In *Norton v. Scholefield*, 9 M. & W. 665, in

(a) See Archbold's Practice, 8th edit., Vol. II. p. 1323, and the cases there cited.

case for erecting a cess-pool near a well, and thereby contaminating the water of the well, it was held that the plea of not guilty put in issue both the fact of the making of the cess-pool, and that of the water being thereby contaminated. There was no plea of not guilty in *Perring v. Harris*: and the same remark applies to nearly all the cases cited. In *Smith v. Thomas*, the *dictum* was *obiter*; the plea was manifestly bad on general demurrer. In *Wylie v. Birch*, the plea did not simply deny the damage, but contained a statement of other affirmative matter: it was a plea in confession and avoidance.

COLTMAN, J. It is not necessary to decide whether a plea to the special damage would have been allowed in this case. The effect of the plea of not guilty may be, to admit that the pupils were lost, but to deny that they were lost in consequence of the words spoken: like the case of an action for driving over and breaking the plaintiff's leg,—the plea of not guilty does not deny that the leg was broken, but it puts in issue whether it was broken by the wrongful act of the defendant. So, here, it seems to me that the special damage alleged was sufficiently traversed by not guilty, and that Mr. *Bramwell's* argument must prevail.

MAULE, J. The substance of the charge in the declaration, is, that the defendant has inflicted injury upon the plaintiff by the speaking of *149] words not *actionable *per se*. The plea of not guilty, in effect, says that the defendant did not injure the plaintiff in the manner alleged: it therefore puts in issue the infliction of the wrong in the mode described. It does not follow, that, where an injury is stated to have occurred from the doing by the defendant of an act which is not in itself actionable, the defendant may not be at liberty to deny that the injury resulted from that act, by a plea less extensive than not guilty: as, in the case of a collision between two vessels, in one of which the plaintiff is a passenger, the plea of not guilty puts in issue, whether the collision occurred through the negligence of the defendant, and also whether the plaintiff sustained the alleged injury by such means: but the defendant may admit the collision, and deny the damage; or he may deny the collision, and admit the damage. It does not follow that because by a certain form of pleading the defendant might have put in issue less, the plea of not guilty should not still be allowed to put in issue everything which is not by the new rules prohibited from being put in issue. I think not guilty puts in issue the special damage, where that is substantially the thing complained of.

CRESSWELL, J. I am of the same opinion. I think it is impossible to distinguish this case from *Norton v. Scholefield*, and the ordinary cases of consequential damage.

V. WILLIAMS, J. I am of the same opinion. In *Perring v. Harris*, there was no denial of the wrongful act complained of, but merely a plea denying that the plaintiff was entitled to be assessed. The case is not an authority for the position for which it is cited.

Rule absolute.

*WRIGHT v. COLLS. June 25.

[*150]

By agreement between A. and B.,—reciting that B. had, as he was advised and believed,—legally and effectually put an end to a certain lease granted to C., and dated the 18th of July, 1839, of a certain farm, &c., by entry thereon under a power therein contained, by reason of the bankruptcy of C.; and that B. had agreed to grant a lease of the farm, &c., to A., for twenty-one years from the 29th of September, 1844, at the same rents, &c., as the same had been held by C.,—it was agreed that B. should grant and A. accept a lease, at a certain rent, payable quarterly,—the said lease to commence on the said 29th of September, 1844, if the defendant could then legally make and execute the same, or so soon after as the defendant should be in a situation to grant the same; that such lease should contain the same covenants, &c., as the lease to C.; and that A. should pay to B., on possession being delivered to him, 500*l.* as a premium for the lease so to be granted.

A. was let into possession, and occupied the farm for about two years, paying the rent; and he also, within that time, paid B. 250*l.* in part of the 500*l.* premium; but, the *flat* against C. having been superseded, B. was unable to grant the lease to A.

A. thereupon brought an action for the breach of contract, alleging in his declaration, that he had always been ready and willing to accept a lease, that the 29th of September, 1844, and a reasonable time for B. to grant the lease, had elapsed and that B. was in a situation to grant a lease. A. also sought to recover back the 250*l.* as money had and received, upon a failure of consideration:—

Held, that the recital in the agreement, and proof of declarations made by B. that C.'s lease was void and good for nothing, were *prima facie* evidence, as against B., that he had power to grant the lease: but that, it appearing also by the recitals in the agreement, that the lease to C. was supposed to be void by reason of C.'s bankruptcy, such *prima facie* case was rebutted by proof of the *supersedeas* of the *flat* against C.; and, consequently, that B. was entitled to the verdict upon an issue as to his ability to grant the lease.

Held, also, that the production of the *supersedeas* was sufficient proof of the issuing of the *flat* against C., and of the fact of its having been superseded.

But, held, that A. was entitled to recover back the 250*l.*, as money paid upon a consideration which had failed.

THIS was an action of *assumpsit*. The first count of the declaration stated, that, before the 29th of September, 1844, to wit, on the 26th of July, 1844, by a certain agreement in writing then made between the defendant of the one part, and the plaintiff of the other part,—after reciting that the defendant did, on a certain day then past, to wit, on the 25th of July then instant, as he was advised and believed, legally and *effectually put an end to a certain lease granted by one James Esdaile to one Samuel Hammond the younger, and bearing date [*151 the 18th of July, 1839, of a certain farm called Hunt's Farm, by entry thereon under the power to him for that purpose contained in the said lease, *by reason of the bankruptcy of the said Samuel Hammond the younger*; and after further reciting that he, the defendant, had agreed to grant a lease of the said farm to the plaintiff, for twenty-one years from the 29th of September, 1844, at the same rents, and under the same terms as the same farm was then lately held by the said Samuel Hammond the younger, save and except of such part thereof as consisted of a certain cottage and premises in the said lease mentioned to be in the occupation of one Edward Hook, upon the following terms and conditions,—it was mutually agreed by and between the plaintiff and the defendant, that the defendant should grant, and the plaintiff should accept, a lease of all the said farm and land (except the said cottage and

premises in the said lease stated to be in the occupation of the said Edward Hook, and also except the timber, game, fish, and wild-fowl, and liberties, as in the said lease to the said Samuel Hammond the younger are excepted), at the yearly rent of 316*l.* 8*s.* clear of all deductions, excepting land-tax, and payable quarterly; the said lease so agreed to be granted and accepted as aforesaid, to commence on the said 29th of September, 1844, if the defendant could then legally make and execute the same, or so soon after as the defendant should be in a situation to grant the same: that it was thereby further agreed by and between the plaintiff and the defendant, that the said yearly rent should commence from the commencement of the term, or on possession being given, which should first happen, and should be paid quarterly; that the plaintiff *152] should pay such further *rents as were provided for and reserved by the said lease to the said Samuel Hammond the younger; and that the said lease so to be granted and accepted as aforesaid, should contain the same or the like covenants, provisoes, conditions, and agreements as were contained in the said lease to the said Samuel Hammond the younger, and such further covenants and agreements as were usual, according to the custom of the country: that it was thereby further agreed by and between the plaintiff and the defendant, that the plaintiff should pay down to the defendant, on possession being delivered to him of the said farm thereby agreed to be demised to him, except the said cottage as aforesaid, the sum of 500*l.* as a bonus or premium for the said lease so to be granted and accepted as aforesaid, and also should pay all the costs, charges, and expenses of the said agreement, and a counterpart thereof, and should execute and deliver a counterpart of the said lease so to be granted and accepted as aforesaid, to the defendant,—the same agreement and lease and counterparts to be prepared by the solicitor of the defendant: and that it was further agreed by and between the plaintiff and the defendant, that the plaintiff should not require, call for, or see, or investigate, the title of the defendant: Mutual premises: Averment, that, after the making of the said promise of the defendant, and before the said 29th of September, 1844, to wit, on the 8th of August, 1844, possession of the said farm, &c. (except the said cottage as aforesaid), was delivered to the plaintiff under the said agreement; and that, on such possession being delivered to him as aforesaid, he, the plaintiff, relying on the said promise of the defendant, paid to the defendant, and the defendant then received of the plaintiff, a large sum of money, to wit, the sum of 250*l.*, in part payment and satisfaction of *153] the said sum of 500*l.* so agreed to be *paid by the plaintiff to the defendant, as a bonus or premium for the said lease as aforesaid; and that, although he, the plaintiff, had always from the time of the making of the said agreement, continually, been ready and willing to accept the said lease so agreed to be granted and accepted as aforesaid, and to execute and deliver a counterpart thereof to the defendant,

according to the terms of the said agreement; and although the said 29th of September, 1844, and a reasonable time for the defendant to grant the said lease so agreed to be granted as aforesaid, had elapsed before the commencement of the suit; and although the defendant, on the said last-mentioned day, and from thence continually hitherto, was in a situation to grant, and could legally make and execute, such lease as last aforesaid, and during all the time aforesaid, had notice of the said several premises thereinbefore mentioned; yet that the defendant, disregarding his said promise, did not nor would, on the said 29th of September, 1844, or at any other time, though often requested so to do, grant to the plaintiff the said lease so agreed to be granted and accepted as aforesaid, but had wholly neglected and refused so to do; and that thereby the plaintiff not only had lost and been deprived of the benefits and advantages of the said lease so agreed to be granted and accepted as aforesaid, and of divers large gains and profits, to wit, to the amount of 500*L.*, which would have accrued to him from the granting of the same, but had also lost and been deprived of the use of the said sum of money so paid by him to the defendant as aforesaid, in part payment and satisfaction of the said sum of 500*L.* so agreed to be paid as a bonus or premium for the said lease as aforesaid.

There was also a count for money had and received.

The defendant pleaded,—first, non assumpsit to both counts,—secondly, to the first count, that the *plaintiff was not ready and willing to accept the lease,—thirdly, to the first count, that the plaintiff had [*154 not paid or offered to pay any part of the residue of the 500*L.*,—fourthly, to the first count, that the plaintiff had not, until the bringing of the action, been in a situation to grant, and could not legally grant, the lease,—fifthly, to the first count, that a reasonable time for granting the lease had not elapsed.

The cause was tried before COLERIDGE, J., at the Chelmsford spring assizes, 1848. The facts that appeared in evidence were as follows:—On the 18th of July, 1839, one James Esdaile granted to one Samuel Hammond the younger, a farm at Upminster, in the county of Essex, for twenty-one years: this lease contained a covenant on the part of Hammond not to assign without consent in writing; and a power of re-entry was reserved to Esdaile in case of Hammond's bankruptcy or insolvency. After the grant of this lease, Esdaile conveyed his interest in the farm to Colls. In 1844, a *fiat* issued against Hammond, under which he was adjudged a bankrupt; whereupon Colls re-entered, under the power reserved in the lease of the 18th of July, 1839, and, on the 26th of July, 1844, entered into an agreement to grant a lease of the farm to Wright. The agreement was as follows:—

“Agreement made the 26th of July, 1844, between Christmas William Colls of the one part, and James Alfred Wright, of Brentwood, Essex, gentleman, of the other part: Whereas the said C. W. Colls did,

on the 25th of this instant July, as he is advised and believes, legally and effectually put an end to the lease granted by James Esdaile, Esq., to Samuel Hammond the younger, and bearing date the 18th of July, 1839, of Hunt's Farm, in Upminster, Essex, by entry thereon under the power *155] to him for that purpose contained in *the said lease, by reason of the bankruptcy of the said Samuel Hammond the younger, and he hath agreed to grant a lease thereof to the said J. A. Wright, for twenty-one years from the 29th of September, 1844, at the same rents and under the same terms as the same farm was lately held by the said Samuel Hammond, save and except such part thereof as consists of the cottage and premises in the said lease mentioned to be in the occupation of the said Edward Hook,—on the following terms and conditions: It is therefore hereby mutually agreed by and between the said C. W. Colls and J. A. Wright, that the said C. W. Colls shall grant, and the said J. A. Wright shall accept, a lease of all the said farm and land (except the cottage and premises in the said lease stated to be in the occupation of Edward Hook, and with such exception of timber, and of game, fish, and wild-fowl, and liberties, as in the said lease to the said Samuel Hammond are excepted), at the yearly rent of 316*l.* 8*s.*, clear of all deductions except land-tax, and payable quarterly. The lease to commence on the 29th of September next, if the said C. W. Colls can then legally make and execute a lease thereof, or as soon after as the said C. W. Colls shall be in a situation to grant a lease. The said yearly rent to commence from the commencement of the term, or on possession being given, which shall first happen, and to be paid quarterly. The said J. A. Wright also to pay such further rents as are provided for and reserved by the said lease to the said Samuel Hammond. The lease to contain the same or the like covenants, provisoes, conditions, and agreements as are contained in the said lease to the said Samuel Hammond, and such further covenants and agreements as are usual, according to the custom of the country. The said J. A. Wright to pay down to the said C. W. Colls, on possession being delivered to him of the said farm hereby agreed to be demised to him *(except the said cottage as aforesaid), the sum of 500*l.*, as *156] a bonus or premium for the said lease; and also to pay all the costs, charges, and expenses of this agreement, and a counterpart thereof, and of the said lease, and of a counterpart thereof, and to execute and deliver a counterpart of such lease to the said C. W. Colls: the same agreement and lease and counterparts to be prepared by the solicitor of the said C. W. Colls. The said J. A. Wright is not to require, or to call for, or to see or investigate, the title of the said C. W. Colls. The said J. A. Wright to take the growing crops at a valuation, to be made by two arbitrators, one to be named by each party, with power for those two arbitrators to name an umpire; the award of any two of them to be binding. And, in case either party shall refuse or neglect, for ten days, to name an arbitrator, after the other party has named an arbitrator,

then the arbitrator so named shall have power to name another arbitrator, and he and such arbitrator so named by him, shall have liberty to name an umpire, if they cannot agree; and the award of any two of them to be binding. But, if the said C. W. Colls should not have legal right to sell the said crops, he is not to be bound so to do. Witness, the hands of the said parties," &c.

Under this agreement, the plaintiff was let into possession of the farm, which he occupied for two years, during which he duly paid the rent reserved, and also paid 250*l.* of the 500*l.* bonus. Hammond having presented a petition to the court of review, in January, 1845, obtained a *supersedeas* of the *fiat* against him; and in 1846 commenced an ejectment to recover possession of the farm.

One Woodward, who was called as a witness on the part of the plaintiff, proved that the defendant had *repeatedly declared to him that Hammond's lease was void, and good for nothing. [*157]

It also appeared, that, in September, 1844, a draft lease had been submitted by the defendant to the plaintiff's solicitor, and returned by him approved.

The only evidence of the issuing of a *fiat* against Hammond, was, the production of a *supersedeas*, which the learned judge ruled to be sufficient for that purpose.

As to the first issue, the learned judge merely left it to the jury to find what damages the plaintiff had sustained by the defendant's breach of contract. Upon the second issue, he directed the jury to find for the plaintiff, which they did: upon the third issue, he directed them to find for the defendant; they, however, found that issue for the plaintiff: upon the fourth issue, he directed a verdict for the plaintiff,—reserving leave to the defendant to move to enter the verdict on that issue for the defendant, if the court should think him so entitled: upon the fifth issue, he gave the jury no direction, and that issue they found for the plaintiff: and, as to the count for money had and received, the learned judge told the jury that the plaintiff was entitled to recover the 250*l.* which he had paid on account of the 500*l.* premium.

The jury thereupon assessed the damages on the first count at 50*l.*, and on the second at 250*l.*

Shee, Serjt., in Easter term, 1848, obtained a rule nisi for a new trial, on the ground of misdirection, and that the assessment of damages upon the two counts was inconsistent: and also to arrest the judgment, on the ground that there was no averment in the declaration that the plaintiff tendered, or was ready and willing to pay, the 250*l.*, residue of the 500*l.*

**Lush* and *Hawkins*, in Hilary vacation, 1849, showed cause. The payment of the 500*l.* was not a condition precedent: that [*158] sum was to be paid on possession being given of the farm; but the lease was not to be granted until the defendant could legally execute it. In *Pordage v. Cole*, 1 Wms. Saund, 319 *l.*, it was held, that, if it be agreed

between A. and B., that B. shall pay A. a sum of money *for his lands, &c., on a particular day*, these words amount to a covenant by A. to convey the lands; for, *agreed* is the word of both; but it is an independent covenant, and A. may bring an action for the money *before any conveyance* by him of the land. This case falls precisely within the first rule in the notes to that case,^(a) where it is said: "If a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or *may* happen, *before* the thing which is the consideration of the money, or other act, is to be performed, an action may be brought for the money, or for not doing such other act, *before* performance; for, it appears that the party relied upon his *remedy*, and did not intend to make the *performance* a condition precedent: and so it is where *no time* is fixed for performance of that which is the consideration of the money or the act."^(b) This seems to be the ground of the judgment in this case of *Pordage v. Cole*, the money being appointed to be paid on a *fixed day*, which might happen *before* the lands were, or could be, conveyed." [MAULE, J. *Pordage v. Cole* would apply, if this were an *159] action for the non-payment of the money. *Where the two acts are to be done concurrently, or the act to be done by the plaintiff is to be done *before* the other, the plaintiff must aver that he was ready and willing to do it.] If the covenants are distinct and independent, neither need aver performance on his part.

The finding upon the third plea aids the defect, if there be any, in the declaration. The jury have negatived that plea. [CRESSWELL, J. Every part of it?] Yes. [CRESSWELL, J. Then they find that the plaintiff has paid the whole 500*l.* MAULE, J. The verdict upon the issue on *de injuriâ* to that plea, only finds that enough of the plea is disproved to make the traverse insufficient.] It negatives the excuse. [MAULE, J. No; it affirms that some one of the necessary component parts of the excuse, is not true.] This is somewhat analogous to the case of *Brooke v. Brooke*, 1 Sid. 184, where, in trespass for taking a hook, the defendant pleaded that he had a way to a certain wood, over the land of the plaintiff, that he was passing along it, and the plaintiff endeavoured to cut his harness, and to wound him with the said hook, and that therefore he took the hook out of the hands of the plaintiff, and delivered it to a constable, &c. Issue was taken upon the right of way, and a verdict was found for the plaintiff. It was afterwards moved, in arrest of judgment, that the plaintiff had not shown in his declaration that the hook was in his possession: and it was agreed by the court, that, if the defendant had pleaded not guilty only, the judgment would have been arrested, because the plaintiff in his declaration had not alleged that the hook was his, nor shown that it was in his possession. But the court

(a) 1 Wms. Saund. 320 b, n. (4).

(b) Citing *Dyer*, 76 a, in margin; *Thorpe v. Thorpe*, 1 Salk. 171, 1 Ld. Raym. 665, 1 Lutw. 250, 12 Mod. 461; per HALD, C. J., *Peter v. Ople*, 1 Vent. 177, 2 Saund. 350; *Callonel v. Briggs*, 1 Salk. 113; *Terry v. Duntze*, 2 H. Blac. 389; *Campbell v. Jones*, 6 T. R. 572.

were of opinion that the defendant had by his special plea made the declaration good; for, he pleaded that he took the hook *out of the possession* of the *plaintiff; wherefore the plaintiff might well maintain the action, upon his possession, without any property. [MAULE, J. [*160 That proceeded upon the admission in the plea, which admitted the taking, and described the mode of taking consistently with the declaration.] Upon a motion in arrest of judgment, the court is bound to look at the whole record, and at the finding. Here, the jury must be taken to have found, upon the whole record, that it was not true, as alleged in the third plea, that the plaintiff was not ready and willing to pay the residue of the 500*l*. [MAULE, J. I think the plaintiff had no right to call for the lease, until he had paid, or was ready to pay the remaining 250*l*.] If the declaration be good, as it is submitted it is, without the averment of readiness and willingness, and the payment of the whole 500*l*. was not a condition precedent, the plea is immaterial and bad, and the court will not grant a new trial.

Upon the fourth plea, the verdict was properly found for the plaintiff. There was no evidence to show that the defendant was unable to grant the lease. On the contrary, there was evidence whence the jury might fairly infer the contrary; there was the recital in the agreement, and the defendant's declarations to Woodward that Hammond's lease was void and good for nothing; and a draft lease had actually been prepared, and submitted to the plaintiff's attorney, and by him returned approved. The way in which it was attempted to show the defendant's inability to grant the lease to the plaintiff, was, by showing that the *fiat* against Hammond had been superseded; and the only evidence of that was, the production of the *supersedeas*. No *fiat* was put in. Nor was Hammond's lease produced, so that it might be seen whether or not the circumstance of a *fiat* having issued against him, operated a forfeiture. It was proved, indeed, that, in Hilary term, 1846, a *declaration in ejectment was served by Hammond: but it did not appear that the action was [*161 prosecuted.

As to the alleged inconsistency of the finding of damages on the first and second counts,—that merely arises from the jury having erroneously severed the damages: the whole damages should have been given on the first count. [MAULE, J. And a verdict found for the defendant on the second count.?] Yes.

Shee, Serjt., and *Bramwell*, in support of the rule. The agreement was one entire agreement, all the stipulations on the one side being the consideration for what was to be done on the other side: *Hunt v. Silk*, 5 East, 449. The direction of the learned judge, therefore, was clearly wrong: there having been no entire failure of consideration, the plaintiff was not entitled to recover the 250*l*.

The fourth plea ought unquestionably to have been found for the defendant. There was abundant evidence to show that he never was in a

situation to grant a lease—that the title was in a state of disquietude. The declarations alleged to have been made by the defendant to Woodward, are to be explained by the circumstance of Hammond's bankruptcy. *Gervis v. The Grand Western Canal Company*, 5 M. & Sel. 76, and *Ledbetter v. Salt*, 4 Bingh. 623, 1 M. & P. 597, are distinct authorities to show that the *supersedeas* was sufficient evidence that a *fiat* had issued against Hammond, and that it had been superseded. [MAULE, J. In *Gervis v. The Grand Western Canal Company*, the court treat a commission and a *supersedeas* as a proceeding of a competent tribunal, that is evidence against all the world,—a proceeding *in rem*, like an adjudication in a prize court.] Or in an ecclesiastical court.(a)

*162] *The fifth issue should have been found for the defendant. [COLTMAN, J. The allegation in that plea must mean, a reasonable time from the period at which the defendant should be in a condition to grant a lease.] Precisely so.

As to the damages,—the two findings are clearly inconsistent and incongruous. The plaintiff's right to damages on the first issue, is founded upon the assumption that the defendant has failed to do that which he was bound by the contract to do, viz. to grant a lease. That involves the question raised by the fourth issue—whether the defendant was in a situation legally to grant a lease. The finding on the first issue proceeds on the ground that the defendant *could* have granted a lease: and the finding of damages on the second count proceeds on the ground that the defendant did not and *could not* grant a lease. The 250*l.* could only be recoverable if the consideration wholly failed.

The first count is bad in arrest of judgment, for the reason already stated.

Cur. adv. vult.

COLTMAN, J., now delivered the judgment of the court,—after stating the agreement and the pleadings,—as follows:—

On showing cause against the rule, it was not denied that the third issue ought to have been found for the defendant, the plaintiff having only paid 250*l.*, in part of 500*l.* mentioned in the agreement. But it was contended that there was no ground for granting a new trial on that account, the plea being, as was insisted, an immaterial plea,—the payment of the sum of 500*l.* not being, it was said, a condition precedent.

With respect to the fourth issue, it was contended that the verdict was properly found for the plaintiff. The burthen of proof lay on the plaintiff, who had alleged in his declaration that the defendant *could* *163] have *granted a lease: but he contended that the recital at the commencement of the agreement was *prima facie* evidence against the defendant, that he had power to grant it; and there was evidence given of declarations made by the defendant to one Woodward, that Hammond's lease was void and good for nothing. It may be true that this evidence, though slight, was such as the jury might have acted upon,

(a) Or, in the Exchequer, upon a seizure of goods forfeited. Mann. Exch., 2d edit., 142.

if there had been nothing to explain it. But it appears, by the recitals of the agreement, that the lease to Hammond was supposed to be void on the score of Hammond's being a bankrupt; and the declarations made to Woodward, had reference, no doubt, to the same supposed bankruptcy; and, therefore, when it was shown, as was done in this case, that the *fiat* against Hammond had been superseded, that fact explained the *prima facie* case set up by the plaintiff, and led strongly to the conclusion that the defendant had not any power to make a lease. The verdict on this issue, therefore, seems to us to be wrong; and on that score the defendant will be entitled to have the verdict on the fourth issue entered for him, pursuant to the leave reserved. It is, therefore, unnecessary to decide whether the verdict on the third issue is or is not immaterial.

The remaining question is, whether there is evidence to support the count for money had and received. The agreement in this case was so far acted upon that the plaintiff was admitted into possession, and occupied the land for two years, and paid 250*l.*, in part of the 500*l.*; and, it having turned out in the end that no lease could or would be granted to him, he claims to have the 250*l.* returned to him, as being paid on a consideration which has failed,—that consideration being, as the plaintiff alleges, the promised grant to him of a lease for twenty-one years. The defendant, on the other hand, contended that the consideration for paying the sum of 500*l.* was *not solely the granting of the lease, but [*164 that the whole of the matters agreed to be done on the one side, was the consideration for the whole of the matters to be done on the other side. It may be admitted that such is in general the case,—that the whole of the stipulations on the one side are the consideration for the whole of the stipulations on the other: but such is not necessarily the case; nor is it the case, we think, in this agreement, which is of a special nature; and it is expressly stated in it that the sum in question is a bonus or premium for the lease, and the granting of the lease is the particular consideration for which the bonus was to be given.

It was understood between the parties that there might be some difficulty or delay in granting a valid lease; and therefore the parties contemplated the commencement of a tenancy before the lease was granted; and the yearly rent of 81*l.* 8*s.* was to commence, in that event, from the time when possession was delivered; and the sum of 500*l.* was then to be paid. But it cannot be supposed to have been the intention of the parties that the defendant should keep the sum of 500*l.*, if he never made the lease. The object of the tenant in making such an agreement is, that he may have a security that he shall keep the land for the specified term, so that he may safely lay out money in improvements at the commencement of his term, of which he may reap the benefit before his term is expired. He may reasonably be supposed to have been willing to pay an annual rent for the possession of the land, but not to be willing to pay the bonus or premium, unless he gets the security of the term; and there-

fore it is, that, in express terms, he states that the money is to be paid as a bonus for the lease, not as a consideration for making the agreement. The lease, then, not having been granted, the consideration must, after such a lapse of time, be considered to have failed, and the count for money had and received is maintainable.

*165] *Under this state of circumstances, the defendant is entitled to have the verdict entered for him on the fourth issue; and the verdict for the plaintiff on the other issues will stand.*

Rule accordingly.

BEARD v. EGERTON and Others. June 25.

In the construction of a specification, the whole instrument must be taken together, and a fair and reasonable interpretation given to the words used in it.

A specification of a patent for "a new and improved method of obtaining the spontaneous reproduction of all the images received on the focus of the camera obscura," in describing the process, stated it to be divided into five operations:—"The first consists in polishing and cleaning the silver surface of the plate, in order to properly prepare or qualify it for receiving the sensitive layer or coating (iodine), upon which the action of the light traces the design; the second operation is, the applying that sensitive layer or coating to the silver surface: the third, in submitting in the camera obscura the prepared surface or plate to the action of the light, so that it may receive the images: the fourth, in bringing out or making appear the image, picture, or representation, which is not visible when the plate is first taken out of the camera obscura: the fifth and last operation is, that of removing the sensitive layer or coating, which would continue to be affected and undergo different changes from the action of light,—this would necessarily tend to destroy the design or tracing so obtained in the camera obscura." It then proceeded to give a description of the first operation,—preparing the silver surface of the plate; the concluding part of which directed that nitric acid dissolved in water should be applied *three* different times, the plate being each time sprinkled with pounce and lightly rubbed with cotton: adding—"When the plate is not intended for immediate use or operation, the acid may be used only *twice* upon its surface after being exposed to heat: the first part of the operation, that is, the preparation as far as the second application of the acid, may be done at any time: this will allow of a number of plates being kept prepared up to the last slight operation: it is, however, considered indispensable, that, just before the moment of using the plates in the camera, or the reproducing the design, to put at least once more some acid on the plate, and to rub it lightly with pounce, as before stated: finally, the plate must be cleaned with cotton from all pounce dust which may be on the surface, or its edges." In a subsequent part of the specification, having described the second operation, viz. the application of the iodine, the inventor observed: "After this second operation is completed, the plate is to be passed to the third operation, or that of the camera obscura: whenever it is possible, the one operation should immediately follow the other:"—

Held, that, taking the whole specification together, the direction as to the third application of acid, was not to be understood to be a direction to apply the acid after the second operation, viz. the coating the plate with iodine,—which, it was proved, would render the whole process abortive,—but to apply it as part of the first operation; and that the specification gave sufficient information to an operator of reasonable skill.

CASE, for infringement of a patent. The declaration stated, that, before and at the time of the making the letters-patent, and of the committing of the grievances by the defendants as thereafter mentioned, Miles Berry was the true and first inventor of the working or making of a certain manner of new manufacture within this realm, to wit, a certain invention of a new or improved method of obtaining the spontaneous reproduction of all the images received in the focus of the camera

obscure, and which said invention others, at *the time of the making of the said letters-patent, did not use: that thereupon, [*166 Her present Majesty, Victoria, theretofore, and before the commencement of this suit, to wit, on the 14th of August, in the third year of Her reign, by Her letters-patent, bearing date at Westminster, the day and year last aforesaid, under the Great Seal of Great Britain and Ireland, for Herself, Her heirs and successors, did give and grant unto the said Miles Berry, his executors, administrators, and assigns, Her especial license, full power, sole privilege, and authority that he, the said Miles Berry, his executors, administrators, and assigns, and every of them, by himself and themselves, or by his and their deputy or deputies, servants or agents, or such others as he the said Miles Berry, his executors, administrators, or assigns, should at any time agree with, and no others, from time to time, and at all times thereafter during the term of years therein expressed, should and lawfully might make, use, exercise, and vend the said invention within that part of Her united kingdom of Great Britain and Ireland called England, Her dominion of Wales, and town of *Berwick-upon-Tweed, also in all Her colonies and plantations abroad, in such manner as to him the said Miles Berry, his exe- [*167 cutors, administrators, and assigns, or any of them, should in his or their discretion seem meet; and that he the said Miles Berry, his executors, administrators, and assigns, should and lawfully might have and enjoy the whole profit, benefit, commodity, and advantage from time to time coming, growing, accruing, and arising by reason of the said invention, for and during the term of years therein and in that declaration therein-after mentioned,—to have, hold, exercise, and enjoy the said license, powers, privileges, and advantages thereinbefore granted, or mentioned to be granted, unto the said Miles Berry, his executors, administrators, and assigns, for and during and unto the full end and term of fourteen years from the date of the said letters-patent, and immediately ensuing, and fully to be completed and ended, according to the statute in such case made and provided; and to the end that he the said Miles Berry, his executors, administrators, and assigns, and every of them, might have and enjoy the full benefit and the sole use and exercise of the said invention, according to Her gracious intention thereinbefore declared, Her said Majesty did, by the said letters-patent, for Herself, Her heirs and successors, require and strictly command all and every person and persons, bodies politic and corporate, and all other Her subjects whatsoever, of what estate, quality, degree, name, or condition they should be, within that said part of Her united kingdom of Great Britain and Ireland called England, Her dominion of Wales, and town of Berwick-upon-Tweed, and also in all Her colonies and plantations abroad aforesaid, that neither they nor any of them, at any time during the continuance of the said term of fourteen years thereby granted, either directly or indirectly, should make, use, or put in practice the said *invention, or any [*168 part of the same, so attained unto by the said Miles Berry as

aforesaid, nor in anywise counterfeit, imitate, or resemble the same, nor should make, or cause to be made, any addition thereunto, or subtraction from the same, whereby to pretend himself or themselves the inventor or inventors, deviser or devisors thereof, without the license, consent, or agreement of the said Miles Berry, his executors, administrators, or assigns, in writing, made under his or their hands and seals, first had and obtained, in that behalf, upon such pains and penalties as could or might be justly inflicted on such offenders, for their contempt of that Her royal command; and further to be answerable to the said Miles Berry, his executors, administrators, and assigns, according to law, for his and their damages thereby occasioned: that the said letters-patent were, amongst other things, upon this express condition, that, if the said Miles Berry should not particularly describe and ascertain the nature of the said invention, and in what manner the same was to be performed, by an instrument in writing under his hand and seal, and cause the same to be enrolled in Her said Majesty's high court of Chancery within six calendar months next and immediately after the date of the said letters-patent, then the said letters-patent, and all liberties and advantages whatsoever thereby granted, should utterly cease, determine, and become void, anything thereinbefore contained to the contrary thereof in any wise notwithstanding,—as by the record of the said letters-patent, then remaining enrolled of record in Her said Majesty's high court of Chancery, reference being thereto had, would more fully and at large appear: that the said Miles Berry did afterwards, and within six calendar months next and immediately after the date of the said letters-patent, by an instrument in writing, to wit, a specification, under his hand and seal, *169] particularly describe and ascertain the nature of his said invention, and in what manner the same was to be performed, and did afterwards, and within six calendar months next and immediately after the date of the said letters-patent, to wit, on the 14th of February, in the said third year of the reign of Her said Majesty, and A. D. 1840, cause the said instrument in writing to be enrolled in Her said Majesty's high court of Chancery,—as by the record of the said specification, then remaining enrolled of record, reference being thereunto had, fully appeared: that afterwards, and before the committing by the defendants of the several grievances thereafter mentioned, and before the commencement of the suit, to wit, on the 23d of June, 1841, by a certain indenture then made between the said Miles Berry of the one part, and the plaintiff of the other part,—profert,—the said Miles Berry, for the considerations therein mentioned, did grant, assign, transfer, and set over (amongst other things) unto the plaintiff, his executors, administrators, and assigns, the said letters-patent, and all benefit thereof, and also the exclusive exercise, right, and enjoyment of and to the said invention in the said letters-patent, and thereby granted to the plaintiff, and all and singular the liberties, privileges, profits, emoluments, and

advantages whatsoever appertaining or belonging thereunto, or in any-wise to be had or made thereupon; and all the right, title, interest, term, and terms of years unexpired, property, claim, interest, and demand whatsoever, at law or in equity, of him, the said Miles Berry, of and in, to, out of, and upon the said letters-patent,—to have, hold, exercise, and enjoy, amongst other things, the said letters-patent, and the privileges, authorities, profits, and advantages thereto belonging, unto the plaintiff, his executors, administrators, and assigns, for his and their use and benefit, for and during all the residue of the said term of years then *unexpired in the said letters-patent, and for all other the term and interest (if any) of him the said Miles Berry therein,—as by [*170 the said indenture more fully and at large appeared; whereby the plaintiff then became and was, and thence continually had been, entitled to the said privileges, authorities, benefit, profits, and advantages of the said letters patent: Yet the defendants, well knowing the several premises, but contriving, and wrongfully and injuriously intending to injure the plaintiff, and to deprive him of the profits, benefits, and advantages which he might, and otherwise would have derived and acquired from the making, using, exercising, and vending of the said invention, after the making of the said letters-patent, and after the enrolment of the said specification, and the making of the said indenture, as aforesaid, and within the said term of fourteen years in the said letters-patent mentioned, to wit, on the 24th of June, 1841, and on divers other days and times between that day and the commencement of the suit, and within that part of the united kingdom of Great Britain and Ireland called England, wrongfully, unlawfully, and unjustly, without the leave or license, and against the will of the plaintiff, *did make, use, exercise, and vend the said invention*, to the benefit, use, and enjoyment whereof the plaintiff was and is so entitled as aforesaid, in breach of the letters-patent, and of the privileges to which the plaintiff was and is entitled as aforesaid: That the defendants, well knowing the several premises, but further contriving and intending as aforesaid, after the making of the said letters-patent, and after the enrolment of the said specification and the making of the said indenture as aforesaid, and within the said term of fourteen years in the said letters-patent mentioned, to wit, on the 24th of June, 1841, and on divers other days and times between that day and the *commencement of the suit, and within that part of the united kingdom of Great Britain and Ireland called England, wrong- [*171 fully, unlawfully, and unjustly, without the leave or license, and against the will of the plaintiff, *did put in practice the said invention*, to the benefit, use, and enjoyment whereof the plaintiff was and is so entitled as aforesaid, in breach of the said letters-patent, and of the privileges to which the plaintiff was and is so entitled as aforesaid: That the defendants, well knowing the several premises, but further contriving and intending as aforesaid, after the making of the said letters-patent, and

after the enrolment of the said specification, and the making of the said indenture as aforesaid, and within the said term of fourteen years in the said letters-patent mentioned, to wit, on the 24th of June, 1841, and on divers other days and times between that day and the commencement of the suit, and within that part of the united kingdom of Great Britain and Ireland called England, wrongfully, wilfully, and unjustly, without the leave or license and against the will of the plaintiff, *did make, use, and put in practice a part of the said invention*, to the benefit, use, and enjoyment whereof the plaintiff was and is so entitled as aforesaid, in breach of the said letters-patent, and of the privileges to which the plaintiff was and is so entitled as aforesaid: That the defendants, well knowing the several premises, but further contriving and intending as aforesaid, after the making of the said letters-patent, and after the enrolment of the said specification, and the making of the said indenture as aforesaid, and within the said term of fourteen years in the said letters-patent mentioned, to wit, on the 24th of June, 1841, and on divers other days and times between that day and the commencement of the suit, and within that part of the united kingdom of Great Britain and Ireland called England, *172] wrongfully, wilfully, and *unjustly, without the leave or license, and against the will of the plaintiff, *did imitate the said invention*, to the benefit, use, and enjoyment whereof the plaintiff was and is so entitled as aforesaid, in breach of the said letters-patent, and of the privileges to which the plaintiff was and is so entitled as aforesaid: That the defendants, well knowing the several premises, but further contriving and intending as aforesaid, after the making of the said letters-patent, and after the enrolment of the said specification, and the making of the said indenture as aforesaid, and within the said term of fourteen years in the said letters-patent mentioned, to wit, on the 24th of June, 1841, and on divers other days and times between that day and the commencement of this suit, and within that part of the united kingdom of Great Britain and Ireland called England, wrongfully, wilfully, and unjustly, without the leave or license, and against the will of the plaintiff, *did make certain additions to, and subtractions from, the said invention*, to the benefit, use, and enjoyment whereof the plaintiff was and is so entitled as aforesaid, *and did thereby pretend themselves to be the inventors and devisors thereof*, in breach of the said letters-patent, and of the privileges to which the plaintiff was and is so entitled as aforesaid: And that by means of the committing of the said several grievances by the defendants as aforesaid, the plaintiff had been and was greatly injured, and had lost and been deprived of divers great gains and profits which he might and otherwise would have derived from the said invention and letters-patent, and in respect whereof he had been and was entitled to such privileges as aforesaid, and had been and was otherwise damaged: To the damage, &c.

The defendants pleaded,—first, not guilty.

Secondly, that our Lady the Queen did not give and grant unto the said Miles Berry, his executors, *administrators, and assigns, the license, power, privilege, and authority, profits, benefits, commo- [*173 dities, and advantages in the declaration in that behalf mentioned, by the said letters-patent therein mentioned, in manner and form as in the said declaration was alleged,—concluding to the country.

Thirdly, that the said letters-patent in the declaration mentioned, were obtained and procured from our Lady the Queen, by the fraud, covin, deceit, and misrepresentation of the said Miles Berry and others in collusion with him, wherefore the same were and are void in law,—verification.

Fourthly, that the said Miles Berry was not the true and first inventor of the said new or improved method of obtaining the spontaneous reproduction of all the images received in the focus of the camera obscura, within the meaning of the statute in such case made and provided, in manner and form as in the declaration was alleged,—concluding to the country.

[The fifth, sixth, seventh, and tenth pleas were demurred to, and the plaintiff obtained judgment thereon: *vide* 3 Man. Gr. & S. 97.]

Eighthly, that the said invention was not the making or working of any manner of new manufacture, for which letters-patent could be granted, according to the true intent and meaning of the statute in such case made and provided, concluding to the country.

Ninthly, that the said invention was not, at the time of the making of the said letters-patent in the declaration mentioned, a new invention, as to the public use and exercise thereof within this realm, in manner and form as the plaintiff had above alleged,—concluding to the country.

Eleventhly, that the title and description of the said invention was and is expressed in the said letters-patent *in manner and form as in [*174 the tenth plea mentioned;(a) and that the said title and description was and is in its claim, description, and definition of the said invention, inconsistent and at variance with, and too large for, the said supposed invention as described and ascertained by the said instrument in writing under the hand and seal of the plaintiff,(b) in the declaration mentioned, and was not a true and proper description thereof; wherefore the said letters-patent were and are void,—verification.

Twelfthly, that the said Miles Berry did not, by any instrument in writing under his hand and seal, particularly describe and ascertain the nature of his said invention, and in what manner the same was to be performed, in manner and form as the plaintiff had above alleged,—concluding to the country

(a) The tenth plea was as follows:—"That the title and description of the said invention in the declaration mentioned, was and is expressed in the said letters-patent in the words following, and in no other manner, that is to say, 'A new or improved method of obtaining the spontaneous reproduction of all the images received in the focus of the camera obscura,' wherefore the said letters-patent were and are void in law,"—verification.

(b) Of Miles Berry.

Thirteenthly, that the said Miles Berry did not grant, assign, transfer, or set over to the plaintiff, his executors, administrators, and assigns, the said letters-patent, and all benefit thereof, and the exclusive right, exercise, and enjoyment of and to the said invention, and all and singular the liberties, privileges, profits, emoluments, and advantages whatsoever appertaining or belonging thereto, or to be had or made thereupon, in manner and form as the plaintiff had above alleged,—concluding to the country.

Fourteenthly, leave and license.

Fifteenthly, that the said alleged invention in the declaration mentioned, and in the said letters-patent *and instrument in writing
*175] in the declaration mentioned and described, was and is of no use, benefit, or advantage to the public whatsoever,—verification.

The plaintiff joined issue upon the first, second, fourth, eighth, ninth, twelfth, and thirteenth pleas; and replied to the third, that the said letters-patent were not obtained or procured from our Lady the Queen by fraud, covin, deceit, or misrepresentation,—concluding to the country: to the eleventh, that the said title and description was not nor is, in its claim, description, or definition of the said invention, inconsistent, at variance with, or too large for the said invention as described and ascertained by the instrument in writing in the last-mentioned plea mentioned and referred to, and was a true and proper description thereof,—concluding to the country: to the fourteenth, *de injuriâ*: and to the last plea, that the said invention in the declaration mentioned, and in the said letters-patent and instrument in writing in the declaration mentioned and described, was, at the time of making and granting the said letters-patent, and afterwards, and still is, of use, benefit, and advantage to the public,—concluding to the country.

The defendants joined issue on the replications to the third, eleventh, fourteenth, and fifteenth pleas.

The cause was tried before WILDE, C. J., at the sittings in London after Trinity term, 1847.

Evidence was given by the plaintiff in support of the first, second, third, fourth, eighth, ninth, thirteenth, fourteenth, and fifteenth issues. To prove the twelfth, the specification was put in. The patent was therein described to be for “A new or improved method of obtaining the spontaneous reproduction of all the images received on the focus of, the camera obscura.”

The infringement was admitted.

*After the usual preamble, the specification contained the following preliminary observations:—
*176]

“This invention or discovery relates to photogenic drawing, or the spontaneous reproduction of images, pictures, or representations of nature, by the action of light, that is, by the process or method now well known under the name of ‘Daguerreotype.’ I believe it to be the

invention or discovery of Messrs. Louis Jacques Mande Daguerre and Joseph Isidore Niepce, junior, both of the kingdom of France, from whom the French government have purchased the invention, for the benefit of that country.

"This invention or discovery was fully communicated to me by a certain foreigner residing in France, on or about the 15th day of July, in the year 1839, with instructions, immediately to petition Her Majesty to grant Her royal letters-patent for the exclusive use of the same within these kingdoms; and, in consequence thereof, I did apply for such letters-patent; and Her Majesty's Solicitor-General, after hearing all parties who opposed the same, was pleased, on or about the 2d day of August, now last past, to issue his report to the crown in favour of the patent being granted, and it consequently passed the great seal in the usual course, being sealed on the day above named, which is some days prior to the date of the exposition of the said invention or discovery to the French government, at Paris, by Messrs. Daguerre and Niepce, according to the terms of their agreement. And I now proceed to describe this invention or discovery, as communicated to me.

"*Description of the process.*—The reproduction of the images received at the focus of the *camera obscura*, is effected on plates, or surfaces of silver, which may be plated on copper; the copper serving principally to support the surface or sheet of silver,—the *combination of these two metals contributing towards the perfection of the effect. The silver employed should be without alloy, or as pure as possible. The sheet of copper should be sufficiently thick to preserve the perfect smoothness and flatness of the plate, so that the images may not be distorted by the warping thereof; but the copper should not be thicker than what would be required to attain that end, on account of the weight of the metal. The thickness of the two metals united, need not exceed that of a stout card. [*177

"The process is divided into five operations:—The first consists in polishing and cleaning the silver surface of the plate, in order to properly prepare or qualify it for receiving the sensitive layer or coating, upon which the action of the light traces the design. The second operation is, the applying that sensitive layer or coating to the silver surface. The third, in submitting in the *camera obscura* the prepared surface or plate to the action of the light, so that it may receive the images. The fourth, in bringing out or making appear the image, picture, or representation, which is not visible when the plate is first taken out of the *camera obscura*. The fifth and last operation, is that of removing the sensitive layer or coating, which would continue to be affected and undergo different changes from the action of light:—this would necessarily tend to destroy the design or tracing so obtained in the *camera obscura*.

"*Description of the first operation—preparing the silver surface of the*

plate.—For this operation, are required, a small phial of olive oil, some cotton, very finely carded, a small quantity of pounce or pumice powder, ground extremely fine, and tied up in a small bag of muslin, sufficiently thin in texture to allow the powder to pass easily through when the bag is shaken.—A phial of nitric acid, diluted with pure water, in *178] *about the proportion of one part of acid to sixteen parts of distilled water.* A wire frame or stand, on which the plates can be placed, so as to be heated by means of a lamp. Lastly, a spirit or other lamp to heat the plates. The size of the plates or surfaces are limited by the dimensions of the apparatus.

“The plates must first be well cleaned and polished. To effect this, begin by sprinkling the silver surface with pounce, by shaking the bag, without touching the plate, and then with cotton impregnated with a little olive oil, rub it gently on, lightly moving the hand round in circles from the centre. The plates, during this operation, should be placed flat on a sheet of paper, which must be changed when necessary. The pounce must be sprinkled several times, and the cotton changed several times, during the operation of rubbing.

“The pestle and mortar used for pulverizing the pounce or pumice powder, should not be formed of either cast iron or copper, but made of porphyry. The pounce should be ground afterwards on a glass plate, with a glass muller, pure water being used in the operation. The pounce should be used only when perfectly dry.

“It will readily be conceived how important it is that the pounce or pumice powder should be sufficiently finely pulverized, so as not to cause streaks; for it is, in a great measure, upon the fine polish of the surface of the plate that depends the beauty of the image, picture, or tracing produced thereon.

“When the plate is perfectly polished, it must then be cleaned. This is effected by dusting or sprinkling the powder over the surface, and rubbing it with dry cotton, the movements of the hand being made in circles, and backwards and forwards, and up and down crossing each *179] movement, in order to operate equally on *all parts of the surface.* This is the best mode of rubbing to gain the desired result.

“Next, a small knot or tuft is made with carded cotton, which is to be moistened with a little acid diluted in water, as above stated. To do this, the knot of cotton may be placed on the mouth of the bottle containing the diluted acid, and pressed thereon; the phial being then inverted, and then placed again upright, so that the centre of the tuft of cotton may be moistened with acid without deeply impregnating it. Very little acid is required, and care must be taken not to wet the fingers with it. With this tuft, so charged with acid, the surface must be rubbed, care being taken to carry the acid uniformly over all parts of the surface of the plate; the cotton should be changed several times, and the rubbing of the surface be made by moving the hand round and round, and crossing as

before, so as to extend, equally, the acid; which, nevertheless, ought to do no more than cover slightly the surface of the plate. It will sometimes happen that the acid applied on the surface of the plate will be found to accumulate into small globules,—these must be destroyed by changing the cotton, and by rubbing the plate gently, so as to spread the acid evenly; for, on any place where the acid has been allowed to rest a time, or has not been laid evenly, it would form spots or stains.

“It will be seen that the acid is evenly spread upon the surface of the plate, by its appearing covered with a uniform tint, or what may be termed a thin veil or change of surface. The plate is finally to be sprinkled with pounce or pumice powder, and cleaned by slightly rubbing it with a fresh piece of carded cotton. Instead of ordinary pounce, calcined Venetian tripoli may be used.

“The plate, thus prepared, is then to be submitted *to a considerable degree of heat. To do this, it is placed on a wire frame, [180 the silver surface being uppermost. Under the plate is placed a lighted lamp, which is to be moved about, so that the flame shall act equally upon all parts. When the plate has been submitted to this operation for about five minutes (or until the heat has acted equally upon all parts of the plate), it will be perceived that the surface of the silver has obtained a whitish tint or coating, and then the action of the heat must cease.

“This effect may be obtained by other means; for instance, the heat of lighted charcoal may be used, which may be preferable, as the operation will be sooner finished. In this case, the wire frame is unnecessary, for the plate may be laid on the stove, or held with tongs, the silver surface always being upwards, and it may be moved backwards and forwards on the furnace, so as to heat it equally throughout, until the silver surface becomes covered with a whitish tint, as above stated. The plate is next to be cooled rapidly by placing it on a cold body or substance, such as a marble slab, or stone, or metal surface. When cooled, it must be polished again. This may be quickly done, since it is only necessary to remove the white tint which has been formed on the silver surface. To effect this, the plate is to be sprinkled with pumice powder, rubbed in a dry state with a portion of cotton. This should be done on the surface of the plate several times, taking care to change the cotton often.

“When the silver is well polished it is to be rubbed, as above stated, with acid dissolved in water, and sprinkled with a little dry pounce powder, and rubbed lightly with a knot of cotton. The acid is then to be laid upon the plate, say three different times, care being taken to sprinkle, each time, the plate with powder, and to rub it dry, and very lightly, with clean cotton. *Care should be taken not to breathe upon the [181 plate, or to touch it with the parts of the cotton touched by the fingers, as the perspiration would produce spots or stains; and dampness of the breath, or of the saliva, would produce the same defects in the drawings.

"When the plate is not intended for immediate use or operation, the acid may be used only twice upon its surface, after being exposed to heat. The first part of the operation may be done at any time. This will allow of a number of plates being kept prepared up to the last slight operation. It is, however, considered indispensable, just before the moment of using the plates in the camera, or the reproducing the design, to put, at least once more, some acid on the plate, and to rub it lightly with pounce, as before stated.

"Finally,—the plate must be cleaned, with cotton, from all pounce dust which may be on the surface or its edges.

"*Second operation.*—For this operation, the following implements are required:—The box, represented in figs. 3 and 4; the thin board or frame, shown in fig. 5; four small metallic bands, of the same metals as the plates, seen also in fig. 5; a small handle, and a box of small nails or tacks; and a phial of iodine.

"After having fixed the plate upon the thin board or frame (the silver surface uppermost), by means of the metallic bands, and the small nails which are forced into the board by the handle, some iodine is then to be put into the cup or dish *d*, placed in the bottom of the box, figs. 3 and 4. It is necessary to divide the iodine into pieces, in order to render the exhalation more extensively and equally diffused; otherwise on the middle of the plate would be formed circles, or a kind of *iris*, or appearance of a rainbow, in prismatic colours, which would prevent the plate from receiving an uniform impression.

*[182] "The thin board, with the plate, is then placed, with the silver surface undermost, upon small brackets or supports, at the four angles of the box; its cover *g*, is then closed. In this position, the plate must be left until the surface of the silver be covered with a fine golden tinge, which is caused by the evaporation of the iodine condensing on the surface of the silver. If the plate were allowed to remain too long, this golden yellow colour would turn purple, or violet colour, which must be avoided, because, in this state, the coating is not so sensitive to the effect of light. On the contrary, if this coating is too pale, or not sufficiently yellow, the image taken from nature would be very deficiently or faintly reproduced: therefore, a coating of a golden yellow is particularly desired, because it is the most favourable to the production of the effect.

"The time necessary for this operation cannot be stated; because it depends on several circumstances; one is, the temperature of the room wherein the operation is conducted; another, the state of the apparatus, which, for this process, should be left to itself, and not be affected by the addition of any other heat than that of the room.

"It is very important, in this operation, that the temperature inside the box be equal to that outside; if such were not the case, on the plate

being passed from a cold to a warmer atmosphere, it would become covered with condensed moisture from the atmosphere, which would do great injury to the effect. This operation should be left entirely to the spontaneous evaporation of the iodine. Also, the more this box or apparatus is used, the less time is required to effect the object, because the interior sides of the box become penetrated with vapour of iodine; and as it is the nature of this vapour always to evaporate, it will arise *from all the internal parts of the box, and, therefore, will spread [*183 more evenly and more quickly on the surface of the place, which is very important; therefore, it is proper to leave a little iodine in the cup on the bottom of the box, and also to keep the box free from damp. It is, therefore, evident that the apparatus will operate better after being used several times.

“From the causes above stated, it is not possible to fix, precisely, the time necessary for obtaining the coating of a golden yellow tint, as the same may vary from five to thirty minutes, but rarely longer, unless the weather be very cold. It is necessary to look at and examine the state of the plate from time to time, to ascertain whether it has attained the golden yellow tint required; but it is important that the light should not be allowed to fall or strike directly upon its silver surface. It may happen that the plate may be more coloured or tinted at one end than at the other; in that case, in order to equalize the tint, care must be taken, in replacing the plate, to turn it endways, or side for side.

“In order to accomplish these repeated examinations, without injuring the sensitive ground or coating, this process should be conducted in a darkened room, into which light is admitted sideways, not from the roof. The box should be placed in a dark room, where the light enters but feebly, as through the door left a-jar. Whenever the plate is to be inspected, the operator is to raise the lid of the box, when the board may be taken by its edges with the two hands, and turned up rapidly, very little light being required to show the true colour of the coating; and if the plate has not obtained the golden yellow tinge, it must be immediately replaced in the box, and there kept until it attains the proper gold colour; if, on the contrary, the colour is deeper, then the coating will not be of any use, and *the plate is to be repolished [*184 and cleaned,—the first operations being recommenced.

“From a written description, this operation may seem difficult and tedious; but, with a little practice, an intelligent operator would be enabled to judge, accurately, of the time required to obtain the desired golden yellow tint; and also to inspect, rapidly, the plate, so as not to give the light sufficient time for acting upon the coating.

“When the surface of the plate has attained the proper colour, the board, with the plate, must be introduced into the frame, represented at figs. 6, 7, and 8, which frame is adapted to the camera obscura. In this

transference, care must be taken to prevent the light striking on the surface of the plate; and for this purpose, the camera obscura may be lighted with a wax taper, the light of which has much less effect upon the coated surface; even this light ought not to be allowed to strike too long on the plate, as it will cause marks or traces on the same, if allowed to continue a length of time.

"After this second operation is completed, the plate is to be passed to the third operation, or that of the camera obscura. Whenever it is possible, the one operation should immediately follow the other; the longest interval between the two should not exceed an hour; beyond this time, the action of the iodine and silver surface will lose their requisite photogenic properties. But, previous to passing to the third operation, I would add the following remarks or observations:—

"*First observation.*—Before using the iodine box, the interior should be well cleaned, and the box itself turned upside down, in order to empty it of all the particles of iodine which may have escaped from the *cup; care must be taken not to touch the iodine with the
*185] fingers.

"During the operation of coating the surface with iodine, the cup should be covered with a wire or other gauze, stretched on a frame; this gauze has the effect of regularly distributing the evaporation or vapour of the iodine upon the surface of the plate, and at the same time to hinder, whenever the lid of the box is closed, the compression of air, thereby occasioned, from causing the particles of iodine to be scattered or flying about within the box, which particles might strike the plate and cause spots or blotches thereon; for this reason, the lid of the box should always be closed quietly. The same observation applies in case particles of dust should rise inside the box, which, being charged with the vapour of iodine, might injure the plate by coming in contact with its surface.

"*Second observation.*—The iodine box or apparatus, above described, may be varied according to circumstances, or be substituted by the following contrivance:—A thin deal board, similar to the one used for fixing the plates upon, is first to be saturated with the vapour of the iodine; this may be done in a box similar to the one above described, or even in a box only two inches high. This board, when once properly saturated, may be placed in a small box, two inches high, of the proper length and width, and provided with three grooves or ledges, one to receive the metallic plate or silver surface, and the two others to receive the saturated board, which may be placed nearer to or further from the metallic surface. When placed in the first groove or ledge, it may be at a quarter of an inch distance from the plate; in the second, it may be at a distance of half an inch or more. This second groove, or further position, need only be used in case the operation of coating the surface
*186] should proceed too fast, in *consequence of increase of tempera-

ture, or in case the plate should have been withdrawn before it has reached its proper degree of golden colour.

"This mode or process of coating the surface has the advantage of enabling the operator to coat the plate with iodine with great rapidity, that is to say, generally in a very few minutes. If the operation should proceed too fast, the board, saturated with iodine, may be placed in the upper groove, and the metallic plate underneath: this position causes the operation to proceed slower. It is necessary that this iodine box should be securely closed, to hinder any current of air reaching the surface; and, moreover, in this latter case, the box should only open on one of its sides.

"The board, saturated with iodine, may be made to serve to coat several plates during a whole day, or even several days, without the necessity of replacing it in the iodine saturating box. I will now proceed to describe the third operation.

Third operation—the camera obscura.—As before stated, the operation should proceed as quickly as possible from the second to the third operation, or not leaving more than one hour between both, as, beyond this time, the combination between the iodine and the silver has no longer the same property.

"The apparatus necessary for this operation, is the *camera obscura* (see figs. 9 and 10), adapted and fitted to receive the prepared plates and their boards.

"This third operation is that in which, by means of light acting through the lens of the camera obscura, nature reflects or impresses (to use figurative language) an image of herself of all objects enlightened by the sun, on the surface of the photographic or prepared plates.

"It is easy to conceive, that, this operation being produced only by the agency or effect of light, the action is the more rapid according as the objects are *more brilliantly lighted up, or illuminated, or [*187 in their nature are more intensely white, or present bright lines or surfaces.

"After having placed the camera obscura opposite to, or in front of, the objects of which it is desired to fix or retain the image, or obtain a representation, it is essential, first, to adjust the focus of the camera obscura, so that the objects may be represented perfectly clear and distinct. This is easily done, by moving forward or backward the frame of a plate of ground-glass in the camera, which glass receives the images of the objects from the lens. When this frame is brought to the proper position, this movable part of the camera obscura is fixed by means of screws, applied for that purpose. The ground-glass is then removed from the instrument, care being taken not to move the camera obscura; and, in the place of the ground-glass, is substituted the apparatus, carrying the prepared metallic plate or surface (see figs. 6, 7, and 8), which

apparatus exactly fits the place of the ground-glass plate or its frame. During the time the apparatus, with the prepared surface, is being fastened by small brass buttons or other fastenings, the camera obscura is closed. The obscuring shutters or doors *b, b*, of the apparatus, are then opened by means of the two semicircles *a, a*. The plate is then in a proper position to receive and retain the impression of the image of the objects chosen,—nothing more need be done, but to open the aperture of the camera obscura, and to consult a watch to reckon the minutes the prepared surface shall be under the action of the light.

“This operation is of a very delicate nature, and should be carefully attended to, because nothing is visible; and it is quite impossible to state the time necessary for the reproduction of the image, as it depends *188] entirely on the intensity of light received by *or from the objects, the image of which it is intended to reproduce: the time may vary from three to thirty minutes.

“It must likewise be remarked, that the seasons, as well as the hours of the day, have great influence on the rapidity of the operation. The most favourable hours are, from seven in the morning till three in the afternoon. The process of reproduction, which may require from three to four minutes in the months of June and July, will require from five to six in the months of May and August, from seven to eight in April and September, and so on in proportion as the seasons advance. This is only a general and approximate statement, for objects strongly lighted, as it often happens that twenty minutes are necessary for the operation in the most favourable months, that is, when the objects are partially in shadow or darkness.

“It will be seen, from what has been stated, that it is impossible to name exactly the time necessary for obtaining images or tracings from nature (or photographic designs); but, by a little practice, it may be easily ascertained. Practice is the only sure guide; and, with this advantage, an operator will readily ascertain the required time correctly. Latitude of the situation is of course to be considered:—for example, it is conceived, that, in the south of France, and, generally, in all the countries where the light is very intense, as in Spain or Italy, the plates will receive the impression much more rapidly. It is, however, very important not to allow more time to pass than what is necessary for the reproduction, because the clear parts would no longer be, or remain, white or clear,—they would be darkened by the prolonged action of the light allowed to strike upon the iodine on the surface. If, on the contrary, the time allowed is not sufficient, *then the proof or image *189] would be vague, and without proper details.

“Supposing the operator has failed in one proof, it being imperfect on account of its having been withdrawn too soon, or left to remain too long, another may be begun immediately. If a plate has been previously

prepared, the operator is then more certain of obtaining the proper effect, the second operation being corrected by the first.

"It is desirable and useful, in order to acquire a proper practice, to make some experiments of this kind. The plate or surface having been submitted to the action of the light the required time, I will proceed to describe the—

"*Fourth operation—the mercurial process.*—The operator must hasten to submit the surface of the plate to the fourth operation as soon as it is withdrawn from the camera obscura. Not more than one hour ought to be allowed to expire between the *third* and fourth operations; and it is much more certain to obtain good proofs or tracings of nature, when the fourth operation takes place *immediately after* the third.

"For the fourth operation, the following articles are required;—First, a phial containing a quantity of mercury, or quicksilver. Second, a spirit or other lamp. Third, the apparatus represented in figs. 11 and 12. Fourth, a glass funnel, with a long neck. By means of the funnel, the mercury is poured into the cup *c*, situated in the bottom of the apparatus (shown in the figures), and in a sufficient quantity to cover the ball or globe of the thermometer *f*. From this time, no daylight must be admitted, and the room must be darkened, and the light of a candle or taper only be used to enable the operator to inspect the progress of the operation.

"The board, on which the plate is fixed, must be *withdrawn [*190 from the apparatus, already mentioned, as adopted in the camera; which apparatus preserves it from the contact of light. The thin board, with the plate, is then introduced into the grooves or ledges of the blackened board *b*, fig. 11. This black board is then replaced in the box or apparatus, where it is maintained at an inclination of forty-five degrees. The prepared metal surface *h*, being placed undermost, so that it may be seen through the side glass *g*: the cover *a*, of the box must be put down gently, to prevent any particles of mercury flying about, in consequence of the compression of the air.

"When the whole is thus prepared, the spirit lamp is lighted and placed under the cup containing the mercury, and allowed to remain until the thermometer (the ball of which is immersed in the quicksilver bath, the tube extending outside the box), indicates a temperature of sixty degrees centigrade: the lamp then must be removed. If the thermometer has rapidly risen, it continues to rise even when the lamp is removed, but it should not be allowed to rise above seventy-five degrees centigrade.

"The impression of the image of nature *now actually exists on the plate, but it is not visible*; it is only after several minutes of time has elapsed, that faint tracings of the objects begin to appear, as may be readily ascertained by inspecting the operation, or looking through the

glass, assisted by the light of a candle or taper,—which must not be allowed to strike too long on the plate, because it would leave marks on the same. The plate should be left in the box until the thermometer has fallen to forty-five degrees; then the plate is to be taken out, and this operation is finished.

“When the objects or articles (the reproduction of the images of which it is intended to be produced) have been brightly illuminated, and *191] the light has acted *a little too long in the camera obscura, this fourth operation will be finished, even before the thermometer has gone down to fifty-five degrees; this effect may be perceived by looking through the glass *g*.

“It is necessary, after each operation, to wipe or clean well the interior of the apparatus, in order to remove the slightest coating or layer of mercury which generally covers or adheres to it. The black board or frame *b*, must, likewise, be carefully wiped, that it may not retain any particles of quicksilver. When the apparatus is to be packed up for carrying it from place to place, the mercury which is in the cup must be poured into the phial; this is done by inclining the box, so as to let the mercury escape through the small cock *e*, at the side of the apparatus.

“The picture or plate may now be inspected by means of a weak light, in order to ascertain whether the operation has succeeded or not. It may be taken from off the thin board, by removing the metallic bands or straps, which bands should be cleaned carefully, by means of pounce and a little water, from any iodine or mercury they may have received: this should be done after each plate has been operated upon.

“It will be readily conceived that this cleaning is necessary, since not only these small bands are covered with a coating of iodine, but they have also received a portion of the tracing from nature.

“The plate is then to be placed in a box provided with a cover and grooves, until it can undergo the fifth and last operation. This operation need not be effected immediately, for, the plate or sketch may be kept in this state for several months, without undergoing any alteration, provided, however, it be not frequently inspected or exposed in the open daylight. I will now proceed to the last operation, viz., the—

*192] “*Fifth operation—fixing the tracing, delineation, or *picture.*—The object of the fifth operation, is, to remove from the surface or plate the coating of iodine, which, otherwise, on its being exposed too long to the action of light, would continue to be decomposed, and would thereby destroy the picture or tracing.

“For this operation, the following articles are required:—First, water, saturated with sea salt, or a weak solution of hyposulphite of pure soda. Second, the apparatus represented in figs. 13 and 14. Third, two troughs of tinned metal. Fourth, a vessel or jug full of distilled water.

“In order to remove the coating of iodine, the operator must take the

common salt, and put it into a bottle with a large mouth, the bottle being filled with pure water. To accelerate the dissolving of the salt, the bottle may be shaken from time to time. When the water is completely saturated with salt, it is to be filtered through blotting paper, that no extraneous matters may remain in it, and that it may be perfectly clean.

"Water, saturated with salt, may be prepared in sufficient quantity beforehand, and kept in corked bottles; by this means, the necessity and inconvenience of preparing it every time is avoided.

"Into one of the troughs, the salt water is to be poured, until it is about an inch in depth; the other trough is to be filled with pure water. These two fluids are warmed or heated in temperature, though not to the boiling point.

"In place of the solution of salt, may be substituted a solution of hyposulphite of pure soda: this latter is even preferable, because it completely removes the iodine, which is not always the case when salt is used, especially if the designs or tracings have been obtained some time, and laid aside between the fourth and fifth operations. The mode of operating, however, is the same for the two solutions, although the solution of *hyposulphite does not require to be warmed, and a less quantity of it is required than of the salt and water, since it is [*193 sufficient that the plate should be covered with the same when laid on the bottom of the trough.

"The plate is first to be immersed in the pure water contained in one of the troughs. It must only be dipped in, and drawn out immediately; it is sufficient that the surface of the plate be covered with water, and then, without allowing it to dry, it is to be plunged immediately into the salt water.

"If the plate is not dipped in pure water before immersing it in salt water, or in the solution of hyposulphite, these solutions would make marks or spots on the surface of the plate. To facilitate the action of the salt water, or of the hyposulphite which absorbs the iodine, the plate should be moved about in the liquid, thus producing a gentle washing of the surface.

"When the yellow colour or tint of the iodine is entirely removed from the surface of the plate, it is to be removed, and carefully taken by the edges, so as not to touch or injure the drawing, and then dipped immediately in the first trough of pure water.

"The apparatus, shown in figs. 13 and 14, is then brought into use, and must be perfectly clean, and a vessel filled with distilled water, which should be hot, but not boiling. The plate, on being withdrawn from the trough of water, is to be placed immediately on the inclined plane *e*, and, without allowing it time there to dry, the operator is then to pour upon the surface, bearing the drawing, the hot distilled water, beginning at the top of the plate, and pouring the water over it in such manner that

it shall flow over the surface and carry away with it all the solution of sea salt, or of hyposulphite, which has been already considerably weakened by the immersion of the plate in the first trough. If hyposulphite solution has been used, the *distilled water to be poured over the *194] surface, need not to be so hot as for the common salt solution.

"Not less than a quart of hot distilled water is required for thus washing the surface of a plate measuring eight or nine inches long by six or seven inches wide. It will sometimes occur, that, after having poured warm water on the surface, some drops or globules of water will remain on the plate. In this case, they must be removed before they have time to dry, as they might contain some particles of sea salt, or iodine, and injure the drawings; they are readily removed by strongly blowing on the plate.

"It will be understood how important it is that the water used for this washing, should be perfectly pure, for, part of it will dry on the surface of the plate, notwithstanding the rapidity with which it may have passed over it; and, if it contains extraneous matters, then numerous and indelible spots would be formed on the drawing or tracing.

"In order to ascertain that the water is suited for this washing, a drop may be let fall on a burnished plate, and if, when evaporated by heat, it leaves no stain or mark behind, it may be employed without fear. Distilled water is always sufficiently pure for this operation, without testing.

"When this washing is completed, the picture, drawing, or tracing is finished. The only thing now to be done, is, to preserve its surface from being touched, also from dust, and from vapours which tarnish silver. The mercury which traces the images, or, in other words, by the action of which the images are rendered visible, is partly decomposed,—it adheres to the silver,—it resists the washing by the water poured upon it by its adhesion,—but it will not bear any rubbing or touching.

*195] "To preserve the drawings, they must be covered *with glass, securely placed a little above the surface;—both the edges of the glass and plate secured by pasted paper, or other means; and they are then unalterable, even by the light of the sun.

"It may happen, that, in travelling, the operator may not be able, conveniently, to thus secure the plates; but they may be preserved by enclosing them in a box; and, for greater safety, small bands of paper may be pasted over the junction of the box and its cover.

"It may be necessary to state that the silver surfaces may be used several times, in succession, provided the silver be not polished or ground through to the copper. And it is very important to remove, after each time of using, the mercury traced on, or adhering to, the surface, which is to be done, as before described, by means of pounce or pumice powder and oil, and by changing the cotton often: otherwise, the mercury would

finally adhere to the silver, and the proofs obtained on that combination would always be imperfect, because they would be deficient both in vigour and clearness.

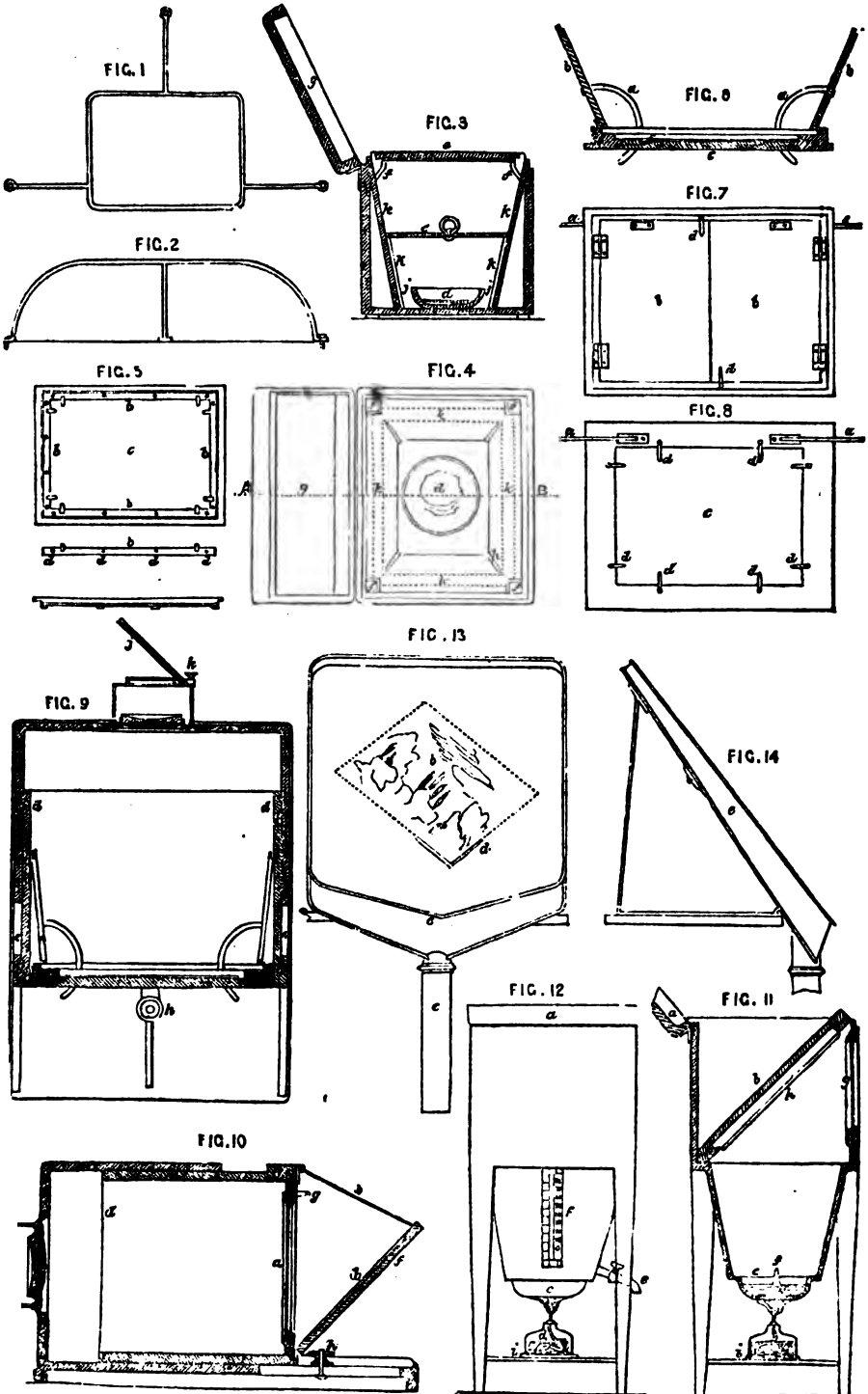
“Explanations of the drawings (see Plate I.) of the apparatus used in these processes or operations of Daguerreotype.—Fig. 1 represents a plan view of a wire frame; fig. 2 is a side view of the same. This frame serves to receive the plates when they are to be heated by the spirit lamp.

“Fig. 5 is a plan view of the thin board or tablet, on which is fixed the plate for the subsequent operations. The plate is fixed on it by means of four thin metal bands, plated with silver,—they should be of the same thickness as the plate. These bands are fixed on the board by small nails, forced or driven into it through holes by means of a handle.

“The surface of these bands, being nearly level with that of the plate, retain it by small projections or pieces soldered on them. These metallic bands have two offices to perform,—one, to secure the plate, [*196 and the other to facilitate the equalization of the coat of iodine, which might otherwise be more intense on the edges or borders of the plate than on its centre.

“Fig. 3 is a vertical section of the iodine box, or apparatus wherein the coating of iodine is obtained upon the silver surface. Fig. 4 is a plan view of the same. *c* is an interior cover, closing the lower part of the box; it serves, when the apparatus is not in operation, to concentrate the evaporation of the iodine, which condenses on the wooden surface of this part of the box; *d* is the cup or dish for containing the iodine; *e* is the thin board, to which is fixed the plate (as represented at fig. 5), the silver surface being downwards; it is thus placed in order to obtain the coating of iodine, as the vapour therefrom rises upwards. The board rests on brackets (*f*) placed at the four angles of the box, the cover *c* being previously removed; *g* is the lid or cover of the box, which should be kept shut, excepting when the plate is taken out for examination; *h h* are small rods at the four corners of the inclined lining (*k*) of the box, to support the cover *c*; *j* represents a disc or sieve of wire, or other gauze, which is to be placed over the cup, in order to equalize the dispersion of the evaporation of the iodine; it serves also to prevent, in case the box should be closed too rapidly, the compressed air from driving out of the cup particles of iodine, which might adhere to the plate, and cause spots on the drawing; *k* is the wooden lining, formed with inclined sides, in the shape of a square funnel; this shape assists to diffuse equally the vapours of iodine, which spread as they rise.

“It is requisite to have a magazine box, or case, and its cover, in which may be enclosed the plates or surfaces, before and after the drawings have been taken. The plates are introduced into and secured by small



*grooves on the insides, so that they cannot rub against one another, they being at the same time preserved from dust. By [*198 pasting strips of paper on the junctions of the cover and box, they may be preserved from all injurious vapours; but this is requisite only for plates or drawings completely finished, or in case the box should not close well.

"Figs. 6, 7, 8, represent different views of the *frame* which receives the thin board carrying the plate or silver surface, and serves to preserve it from the effect of light as soon as it has received the coating of iodine in the box, shown in fig. 8. Fig. 8, a front view, showing the covers or doors to shade the silver surface. Fig. 6 is a section showing the doors in the position they will be in when the plate is exposed to the action of the light in the camera. *a a* are semicircles, or pieces for opening the doors (*b b*), whenever this frame, with the plate, is placed in the camera obscura; *c* is the thin board on which the plate is fixed; *d d* are buttons on both sides of the frame, to fasten the board on the doors; *e* shows the thickness of the frame; *f* is the plate or surface intended to receive the picture.

"Fig. 6 represents the frame with the doors open, as they are at the time when a tracing is taken in the camera obscura.

"*The camera obscura process.*—Fig. 10 is a vertical section, taken through a camera obscura, adapted for the process of Daguerreotype or photogenic delineation, furnished with a frame for carrying the plate of ground glass *a*. The distance this glass plate is to be from the object-glass or lens, is the same as the distance at which the surface intended to receive the image is placed, with the frame and shading doors, as shown in *c*, fig. 9, which figure is a horizontal section, of the camera obscura. *b* is a mirror for observing the effect of objects and selecting points of view: this mirror serves to enable the *operator to choose the scenery, the image of which is to be reproduced; it [*199 should be inclined about forty-five degrees to the horizon, by means of the rod *l*. In order to bring the objects precisely in the focus, the ground-glass should be completely exposed, and the object looked at as reflected on the ground-glass. The image of the object is easily brought into the proper focus, by moving forward or backward the sliding box *d*, taking hold of it at the bottom with both hands by the projections *e*, fig. 9, and forcing it to or from the operator.

"When the focus is properly adjusted, the thumb-screw *h* is turned, to fix the parts in this position. The mirror is kept closed by means of two hooks at *f*, which take into small eyes at *g*; the frame and ground-glass plate is withdrawn, and in its place is substituted the frame carrying the prepared plate or surface, which is so represented in fig. 9, with the shading doors *b* open in the camera obscura. These doors should be internally lined with black velvet, as well as the sliding box *d*, to avoid all reflection of light.

"The object glass is achromatic and periscopic (the concave part must be outside of the camera obscura) : its diameter is about three and a half inches, and its focus about thirteen inches. A diaphragm is placed before the object glass, at a distance of about three and a half inches, and its aperture may be closed by means of a plate on a pivot.

"This camera obscura reverses the objects from right to left, which is not of much consequence in a great number of cases ; but, if it is desired to have an image, drawing, or tracing, in the natural position of the object, a flat looking-glass or mirror is to be placed on the outside beyond the aperture of the diaphragm, as at *j*, fig. 9, it being fixed by means of a screw at *k*. . But, as this arrangement of reflection occasions a loss of light, and injures the photogenic process, about one-third
*200] *more time must be allowed to obtain a tracing or drawing.

"*The mercurial process.*—Fig. 11 is a vertical section of the apparatus, and fig. 12 a front elevation, showing the thermometer. *a* is the cover of the apparatus ; *b* the black board with grooves to receive the board *h*, carrying the silver surface or metallic plate ; *c* the cup containing the mercury or quicksilver ; *d* is the spirit lamp ; *e* is a small cock, through which the mercury may be withdrawn, the apparatus being inclined on one side for that purpose ; *f* is the thermometer ; *g* is a glass window, through which the progress on the silver surface may be inspected ; *h* is the board carrying the metallic plate, which has received the image or design ; *i* is a stand or support for the spirit lamp, which is held by the ring *k*, so that the flame may play on the centre of the cup. All the interior parts of this apparatus ought to be blackened and varnished.

"*The washing apparatus.*—Fig. 18 is a front representation of the washing apparatus, made of tin, varnished. To wash the designs on the plates, they are placed on the stand or angular ledge *d*, see fig. 13. *e* is a ledge to conduct the water to the receptacle *c*. Fig. 14 is a side elevation of this washing apparatus."

A witness called on the part of the plaintiff, to prove that the directions contained in the specification would enable a person of competent skill to perform the operations therein described, stating that the application of acid after the plate had been coated with iodine, would, in his opinion, render the experiment abortive, it was objected, on the part of the defendants, that the specification was bad.

On the part of the plaintiff, it was insisted that no person could be misled by this isolated statement ; and that, taking the whole specification together, and giving *it a fair and reasonable construction,
*201] it was sufficiently explicit.

The learned judge, however, was disposed to think the objection fatal. It was thereupon arranged that a verdict should be taken for the defendants on the twelfth issue, and for the plaintiff on all the others, with 40s. damages ; leave being reserved to the plaintiff to move to enter the verdict on the twelfth issue in his favour, if the court should think the

specification sufficient; and leave being also reserved to the defendants to urge, upon the argument of the plaintiff's rule, several other objections to the specification. (a) And it was further agreed, that the lord chief justice should be *taken to have ruled whatever the court should think he ought to have ruled, and that the plaintiff should [*202 be considered to have tendered a bill of exceptions, if necessary.

Sir *F. Thesiger*, accordingly, in Michaelmas term, 1847, pursuant to the leave reserved to him at the trial, obtained a rule nisi to enter a verdict for the plaintiff on the twelfth issue. He referred to *Bloxam v. Elsee*, 1 C. & P. 558, *Hullett v. Hague*, 2 B. & Ad. 370, *Derosne v. Fairie*, 1 Webster's Patent Cases, 154, 158, *Russell v. Cowley*, 1 C. M. & R. 864, 1 Webster's Patent Cases, 459, 463, *Neilson v. Harford*, 8 M. & W. 806, 1 Webster's Patent Cases, 328, 331, and *M'Alpine v. Mangnall*, 3 Man. Gr. & S. p. 496.

W. H. Watson, *W. R. Grove*, and *J. Brown*, in Hilary term last, showed cause. The specification describes the five several operations that are necessary to produce the effect desired: the first is, the polishing the surface of the silver plate that is to receive the object to be delineated; the second, the application of a layer of iodine; the third, the submitting the prepared plate to the action of light in the camera obscura; the fourth, consists in the bringing out the image, which is effected by the application of mercury; and the fifth relates to the removal of the iodine from the plate, by means of salt. Any application of acid to the plate after it has received the iodine, would render it incapable of receiving the figure intended; or, if applied after the plate has undergone the third operation, would at once remove both iodine and figure. This was proved by one of the plaintiff's own witnesses; and this, it is submitted, is a fatal defect in the specification. The law upon this subject is well laid down by *BULLER, J.*, in **The King v. Arkwright*, 1 Web- [*203

(a) The main objections taken by the defendants at the trial, were as follows:—

1. That the expression "spontaneous" used in the title of the patent was erroneous,—the images not being spontaneously reproduced; because, after the silver plate has been treated with iodine, and exposed to light, no picture is visible, nor does it become so until the plate has been subjected to the mercurial process.

2. The second objection was to the use of the words "new or improved," in the title, and that the specification did not distinguish between what was new and what was improved.

3. The third objection was to the words in the title, "all the images received in the focus of the camera obscura," whereas only stationary objects can be taken by the patented process, and those only by daylight, and the camera obscura receives images by artificial light.

4. The fourth objection was, that the specification did not distinguish between new and old.

5. The fifth objection was, that the specification contained the following direction,—“It is, however, indispensable, that, just before the moment of using the plate in the camera, or the reproducing the design, to put some acid (nitric) on the plate, and rub it lightly with pounce;” whereas, the use of nitric acid and pounce after iodising the plate, would render the production of any image quite impossible, as the acid and rubbing after the plate had been in the camera, would take the iodine and image off the plate altogether.

6. The sixth objection was, that the specification was insufficient to work by, and threw experiments upon the public.

7. The seventh was, that some of the processes were not new; *ex. gr.* the first and third,—the cleaning and polishing of the plate,—and the camera obscura.

ster's Patent Cases, 66, where, in leaving the case to the jury, that learned judge said: "It is clearly settled at law, that a man, to entitle himself to the benefit of a monopoly, must disclose his secret, and specify his invention in such a way that others may be taught by it to do the thing for which the patent is granted; for, the end and meaning of the specification is, to teach the public, after the term for which the patent is granted, what the art is; and it must put the public in possession of the secret in as ample and beneficial a way as the patentee himself uses it. This I take to be clear law, as far as it respects the specification; for, the patent is the reward which, under the act of parliament, is held out for a discovery; and, therefore, unless the discovery be true and fair, the patent is void. If the specification, in any part of it, be materially false or defective, the patent is against law, and cannot be supported. It has been truly said by the counsel, that, if the specification be such that mechanical men of common understanding can comprehend it, to make a machine by it, it is sufficient; but then it must be such that the mechanics may be able to make the machine, by following the directions of the specification, without any new inventions or additions of their own." In *Turner v. Winter*, 1 T. R. 602, ASHHURST, J., says: "I think, that, as every patent is calculated to give a monopoly to the patentee, it is so far against the principles of law, and would be a reason against it, were it not for the advantages which the public derive from the communication of the invention after the expiration of the time for which the patent is granted. It is, therefore, incumbent on the patentee to give a specification of the invention, in the clearest and most unequivocal terms of which the subject is capable. And, if it appear that there is any unnecessary *ambiguity affectedly introduced into the specification, or anything which tends to mislead the public, in that case, the patent is void." Again, in *Bloxam v. Elsee*, 6 B. & C. 169, ABBOTT, C. J., says: "If any material part of the representation was not true, the consideration has failed in part, and the grant is consequently void; and a defendant in an action for infringing the patent, has a right to say that it is so." And in *Bainbridge v. Wigley*, Parl. Pat. Rep. 1829, Appendix, p. 197, Hindmarch on Patents, 183, where a patent was taken out for improvements on the flageolet and English flute, in the specification of which it was stated, that, by the improvements, the instrument produced new *notes* not before produced on the old instrument; and it appeared in evidence, that, although the invention was a great improvement, yet only *one* new note was produced; Lord ELLENBOROUGH held that this was fatal to the patent, the consideration on which it was granted not being truly stated. Since the statute 5 & 6 W. 4, c. 83, s. 1, which enables a patentee to enter a disclaimer as to part of his specification, there is still less reason for construing such instruments with undue liberality. So, in *Neilson v. Harford*, 8 M. & W. 806, 1 Webster's Patent Cases, 331, it was held, that, if a speci-

fication contain an untrue statement in a material circumstance, of such a nature, that, if literally acted upon by a competent workman, it would mislead him, and cause the experiment to fail, the specification is therefore bad, and the patent invalidated; although the jury, on the trial of an action for the infringement of the patent, find that a competent workman, acquainted with the subject, would not be misled by the error, but would correct it in practice. In *Morgan v. Seaward*, ALDERSON, B., addressing the jury, says (1 Webster's Patent Cases, 178): "It is the duty of a party who takes out a patent, to *specify what his invention really is; and, although it is the bounden duty of a jury [*205 to protect him in the fair exercise of his patent right, it is of great importance to the public, and by law it is absolutely necessary, that the patentee should state in his specification, not only the nature of his invention, but how that invention may be carried into effect." Unless he be required to do that, monopolies would be given for fourteen years to persons who would not on their part do what in justice and in law they ought to do, state fairly to the public what their invention is, in order that other persons may know what is the prohibited ground, and in order that the public may be made acquainted with the means by which the invention is to be carried into effect." In *The King v. Wheeler*, 2 B. & Ald. 345, a patent was taken out for "a new or improved method of drying and preparing malt:" in the specification, it was stated that the invention consisted in exposing malt, previously made, to a very high degree of heat; but it did not describe any new machine invented for that purpose, nor the state, whether wet or dry, in which the malt was originally to be taken for the purpose of being subjected to the process; nor the utmost degree of heat which might be safely used; nor the length of time to be employed; nor the exact criterion by which it might be known when the process was accomplished: and it was held that the specification was not sufficiently precise, and the patent consequently void. ABBOTT, C. J., in pronouncing the judgment of the court, there says: "A specification which casts upon the public the expense and labour of experiment and trial, is undoubtedly bad. If it be said that all these matters will be well or easily known to a person of competent skill (and to such only the patentee may be allowed to address himself), then the inventor will not in reality have given *any useful or valuable information to the public: so that, [*206 in either way of viewing the case, there is either no certain and clear process described, or the process described is such as might be practised without the assistance of the patentee."

The specification is vague and uncertain. In describing the first process, it is said that the prepared plate is to be submitted to "a considerable degree of heat." Again, in describing the second operation, it is said, that "the time necessary for this operation cannot be stated, because it depends on several circumstances." [CRESSWELL, J. Taking

it all together, it amounts to this—"you must keep the plate in the iodine box until it assumes a golden yellow tint." MAULE, J. If so much nicety of description were required, it would be impossible to draw a specification at all. It is enough if it be so explicit as to enable a man of ordinary competent skill, and willing to learn, to perform the operation.] The time for the performance of the third operation is also extremely vague. The whole is uncertain and obscure.

The specification omits to distinguish between what is old and what is new. In *Macfarlane v. Price*, 1 Stark. N. P. C. 199, 1 Webster's Patent Cases, 74, n., it was held, that, in the specification of a patent for an *improved* instrument, it is essential to point out precisely what is new and what is old; and that it is not sufficient to give a general description of the construction of the instrument, without making such distinction, although a plate is annexed, containing a detached and separate representation of the parts in which the improvement consists. Lord ELLENBOROUGH, in nonsuiting the plaintiff, said: "The patentee in his specification ought to inform the person who consults it, what is new, and what is old. He should say, my improvement consists in this, describing it by *207] words, if he can, or, if not, by reference to figures. But, here the improvement is neither described in words nor by figures; and it would not be in the wit of man, unless he were previously acquainted with the construction of the instrument, to say what was new and what was old. The specification states that the improved instrument is made in manner following: this is not true, since the description comprises that which is old, as well as that which is new. Then, it is said, that the patentee may put in aid the figures: but, how can it be collected from the whole of these, in what the improvement consists? A person ought to be warned by the specification against the use of the particular invention: but it would exceed the wit of man to discover from what he is warned in a case like this." In *Morgan v. Seaward*, 2 M. & W. 544, PARKE, B., in delivering the judgment of the court, says: "That a false suggestion of the grantee avoids an ordinary grant of lands or tenements from the crown, is a maxim of the common law: and such a grant is void, not against the crown merely, but in a suit against a third person: *Travell v. Carteret*, 8 Lev. 135; *Alcock v. Cooke*, 5 Bingh. 340, 2 M. & P. 625. It is on the same principle that a patent for two or more inventions, when one is not new, is void altogether, as was held in *Hill v. Thompson*, 8 Taunt. 375, 2 J. B. Moore, 424, and *Brunton v. Hawkes*, 4 B. & Ald. 541, for, although the statute invalidates a patent for want of novelty, and consequently, by force of the statute, the patent would be void, so far as related to that which was old, yet the principle on which the patent has been held to be void altogether, is, that the consideration for the grant is the novelty of all, and, the consideration failing, or, in other words, the crown being deceived in its grant, the patent is void, and no action is maintainable upon it."

In *Saunders v. Aston*, 8 B. & Ald. 881, a patent was *taken out for improvements in making buttons: the specification stated the improvement to consist in the substitution of a flexible material for metal shanks, and it described the mode in which this material might be fixed to the intended button, and made to project from it in the necessary condition for use, by the help, among other things, of a metal collet or ring with teeth: neither the construction of the button, nor the application of a flexible shank, was new; the use of the toothed ring, as described in the specification, was so, but this was not stated to be the subject-matter of the invention; and it appeared by the specification that the effect produced by it might be brought about in other modes, which the plaintiff had also used: it was held, that the patent was not sustainable, since the invention consisted only in combining two things which were not new, and the use of the toothed ring in forming the flexible shank, though new, was not the object of the invention, but only a mode, among others which were already known, of carrying it into effect. [WILDE, C. J., referred to *Haworth v. Hardcastle*, 4 M. & Scott, 720.] The principle was again acted upon in *Hill v. Thompson*, 8 Taunt. 875, 2 J. B. Moore, 424, *Felton v. Greaves*, 3 C. & P. 611, and *Cook v. Pearce*, 8 Q. B. 1044, 1054. Here, the specification contains five things, two of which, at least, are old.

Further, the invention specified, is not that which the title of the patent points at. The title is for "a new or improved method of obtaining the spontaneous reproduction of all the images received in the focus of the camera obscura." Now, that is untrue in several respects. In the first place, it appeared that stationary objects only can be taken: and, in the next place, it is only by the light of the sun that the process in question *can be performed; whereas, it is well known that the camera obscura will reproduce images by artificial light. Nor is the image produced spontaneously, as alleged; its reproduction depends upon a subsequent chemical operation; and it appears that the plate requires to be submitted to the rays of light for about thirty minutes. The title, therefore, is clearly inaccurate.

Sir *F. Thesiger*, *F. Robinson*, and *Webster*, in support of the rule. Taking the whole of the specification together, and applying a fair and reasonable construction to each part of it, ample information is given to an operator of competent skill. The inaccurate use of words, for instance,—as in *Derosne v. Fairie*,—will not vitiate a specification, if the sense be sufficiently plain. In *Russell v. Cowley*, 1 C. M. & R. 864, 1 *Webster's Patent Cases*, 459, 463, a patent claimed the invention of manufacturing tubes by drawing them through rollers, using a maundril in the course of the operation: a later patent claimed the invention of manufacturing tubes by drawing them through fixed dies or holes, but the specification was silent as to the use of the maundril: and it was held, that, taking the whole specification together, it must be inferred,

that the maundril was not to be used, and that the patent was good. PARKE, B., there says: "In the construction of a patent, the court is bound to read the specification so as to support it, if it can fairly be done. Taking the whole effect of the specification together, it is clear that it was intended to exclude the maundril." And in *M'Alpine v. Mangnall*, 3 Man. Gr. & S. 496, the same learned judge, delivering the judgment of the court of error, lays down the same rule of construction. "The patentees," he observes, "begin by describing their improvements *210] to consist in a novel *arrangement of mechanism for the purpose of stretching, drying, and finishing woven fabrics. They afterwards go on to explain their mode of conducting the operation, evidently referring to some known mode of stretching and drying cloth: and, towards the close, they remark that they are aware that many simple contrivances might be devised for effecting the object of their improvements, viz. *giving vibratory motion to the selvages of the cloth*, for the purposes above stated: but they go on to say—'as it is not practicable to describe every possible method in detail, we desire it to be understood that any mode even of moving one side or selvage of the cloth whilst the other remains stationary, we shall consider to be an evasive imitation of our invention, if for the purpose of drawing the threads into diagonal positions by *mechanical means*, instead of manual labour.' The beginning and the end of the specification, it is true, rather bear the aspect of claiming the machinery for the whole process. But, taking the specification altogether, and *giving its words a fair and reasonable interpretation*, it seems to be obvious that the patentees only claim as their invention those improvements on the old machine that give the vibrating motion to the fabric in the course of drying." It was not possible for an operator possessed of a reasonable amount of skill and chemical knowledge, to be misled by the direction in this specification, as to the application of the acid for the third time to the plate. He would at once understand that to be a part of the first process, and to be intended to precede the submitting the plate to the action of the light in the camera obscura. To use the language of PARKE, B., in *Neilson v. Harford*, 8 M. & W. 824, the specification is such as, "if fairly followed out by a competent workman, without invention or addition, *211] *would produce the machine (or, in this case, the *result*) for which the patent is taken out." The plaintiff is, therefore, clearly entitled to have the verdict entered for him on the twelfth issue.

Cur. adv. vult.

WILDE, C. J., now delivered the judgment of the court.

This was an action on the case by the assignee of a patent, for the infringement of a patent granted to Miles Berry, and by him assigned to the plaintiff, for "an invention of a new or improved method of obtaining the spontaneous reproduction of all the images received in the focus of the camera obscura."

The defendant pleaded,—first, not guilty,—secondly, *non concessit*,—thirdly, that the patent was obtained by fraud,—fourthly, that Miles Berry was not the first inventor,—fifthly, sixthly, and seventhly, pleas that were demurred to,—eighthly, that the invention was not a new manufacture for which letters-patent could be granted,—ninthly, that it was not a new invention, as to the public use,—tenthly, a plea to which there was a demurrer,—eleventhly, that the title was, in its claim, description, and definition, inconsistent and at variance with, and too large for the invention, as described in the specification [to which the plaintiff replied, that the description was true and proper],—twelfthly, that Miles Berry did not by any instrument in writing, &c., particularly describe the nature of his invention, &c.,—thirteenthly, that Miles Berry did not assign to the plaintiff,—fourteenthly, leave and license [replication, *de injurid*],—fifteenthly, that the invention was of no use to the public; to which the plaintiff replied, that it *was* of use, &c.

At the trial, before me, at the sittings in London, after Trinity term, 1847, evidence was given by the *plaintiff to maintain the first, [*212 second, third, fourth, eighth, ninth, thirteenth, fourteenth, and fifteenth issues. To prove the twelfth issue, the specification was put in; which, after stating that the invention was communicated to the patentee by a foreigner residing in France, proceeded to describe the process thus:—"The process is divided into five operations." [His lordship read the specification.]

A witness, called to prove that the specification would enable a person of competent skill to effect the reproduction of images received in the focus of the camera obscura, stated that the application of acid after the plate had been coated with iodine, would render the experiment abortive; whereupon it was objected by the counsel for the defendant, that the specification was bad; that the third of the five operations described, is, submitting in the camera obscura the prepared surface or plate to the action of the light, that it may receive the images,—the second operation being the coating the plate with iodine. But the specification says,—“It is, however, considered indispensable just before the moment of using the plates in the camera, or reproducing the design, to put at least once more some acid on the plate, and to rub it lightly with pounce, as before stated.” And it was argued, that, as this was to be done just before the moment of using the plates in the camera, it must be done after the plates had been coated with iodine. The specification, therefore, described that as indispensable, which, according to the evidence, would render the whole experiment fruitless.

I inclined to the opinion that the objection was fatal: and it was arranged that the jury should find a verdict for the defendant on the issue on the twelfth plea,—the plaintiff having leave to move to enter the verdict in his favour, if the court should think the specification sufficient:

*213] but the defendants' counsel also had *liberty to raise, on the argument of such rule, other objections to the specification.

The other issues were found for the plaintiff, with 40s. damages.

In Michaelmas term, 1847, a rule nisi was granted according to the leave reserved; which was argued in last Hilary term. The counsel for the defendants, on that occasion, raised several other objections to the specification: but it is unnecessary to notice them now, as they were disposed of during the argument. But the court took time to consider the arguments on the more substantial question which had been raised on the trial of the cause: and we have now come to the conclusion that the objections then made to the specification cannot be sustained. In *Russell v. Cowley*, 1 C. M. & R. 864, which was an action for the infringement of a patent granted for "certain improvements in manufacturing tubes for gas and other purposes," a question arose as to the sufficiency of the specification. The substance of the invention was, a method of manufacturing iron tubes without the use of a maundril: the specification did not, in terms, say that a maundril was not to be used; but the court held, that, taking the whole specification together, it was plain that any man of intelligence would understand that a maundril was not to be used; and that it was sufficient: and PARKE, B., said: "In the construction of a patent, the court is bound to read the specification so as to support it, if it can fairly be done. Taking the whole effect of the specification together, it is clear that it was intended to exclude the maundril." Again, in *Neilson v. Harford*, 8 M. & W. 825, it was said, with reference to another specification,—“It is a just rule of construction, to judge of the meaning of a particular phrase, by taking the whole instrument *214] *together.” Again, in *M'Alpine v. Mangnall*, 3 Man. Gr. & S. 496, where it had been urged that the specification claimed too much, the court said—"The beginning and the end of the specification, it is true, rather bear the aspect of claiming the machinery for the whole process. But, taking the specification altogether, and giving its words a fair and reasonable interpretation, it seems to be obvious that the patentees only claim as their invention those improvements on the old machine, that give the vibrating motion to the fabric while in the course of drying," *Ib.* 518. Applying the same principle of construction to the specification before us, we think it is free from any such mistake or obscurity as would mislead a person of fair intelligence. The specification states that the process is divided into five operations. "The first consists in polishing and cleaning the silver surface of the plate, in order to properly prepare or qualify it for receiving the sensitive layer or coating, upon which the action of the light traces the design. The second operation is, the applying that sensitive layer or coating to the silver surface. The third, in submitting in the camera obscura the prepared surface or plate to the action of the light, so that it may receive the images. The fourth, in bringing out or making appear the image,

picture, or representation, which is not visible when the plate is first taken out of the camera obscura. The fifth and last operation, is, that of removing the sensitive layer or coating, which would continue to be affected, and undergo different changes from the action of light:—this would necessarily tend to destroy the design or tracing so obtained in the camera obscura.” It then gives a description of the first operation,—preparing the silver surface of the plate; the concluding part of which directs that nitric acid dissolved in water is to be applied *three different times, care being taken to sprinkle each time the plate with powder, and rub it dry, and very lightly, with clean [*215 cotton: and this concludes the description of the first operation, viz. the preparing the silver surface of the plate, when it is intended for immediate use: and to this part of the specification no objection was, or could be, made. But then some further information is given respecting the preparation of the plate, in these words:—“When the plate is not intended for immediate use or operation, the acid may be used only twice upon its surface after being exposed to heat. The first part of the operation, that is, the preparation as far as the second application of the acid, may be done at any time: this will allow of a number of plates being kept prepared up to the last slight operation. It is, however, considered indispensable, that, just before the moment of *using the plates in the camera*, or the reproducing the design, to put at least once more some acid on the plate, and to rub it lightly with pounce, as before stated: finally, the plate must be cleaned with cotton from all pounce dust which may be on the surface or its edges.” Upon this part of the specification, it was contended that the direction to apply acid just before the moment of using the plates in the camera (which is the third operation), was a direction to use it after the second operation, viz. the coating the plate with iodine; and that using the acid at that period would entirely spoil the whole process. But it must be remembered that the passage in question is part of the directions given for performing the first operation, viz. preparing the plate to receive the iodine. It is to be observed, when the plate is not intended to be used immediately, and where it has previously been *partially*, but not *entirely*, prepared for the iodine, this last application of acid is still to *precede the second operation*. The whole passage may be considered as in a *parenthesis; and the expression “just [*216 before the moment of using the plate in the camera,”(a) is put in opposition to the time of partially preparing the plate; after which it is supposed to have been laid by for future use. That this is the real meaning of the passage, is further manifested by what follows in a subsequent part of the printed specification,—“After this second operation (viz. the application of iodine) is completed, the plate is to be passed to the third operation, or that of the camera obscura. Wherever it is possible, the one operation should immediately follow the other.” It is plain, there-

(a) The expression in the French specification, was, “*au moment*.”

fore, that the patentee did not intend any separate operation to intervene between the application of iodine and the introduction of the plate into the camera obscura. The last application of acid must, therefore, have been intended to precede the second operation.

This, we think, is the fair construction of the language of the specification. And, although there may, at first sight, be some appearance of obscurity in it, we think that it is cleared away by a consideration of the whole; and that it is sufficiently plain to be understood by an operator of fair intelligence. If that be so, it follows that the rule to enter a verdict in favour of the plaintiff should be made absolute.

Rule absolute.

***217]** **GROOM and Another, Assignees of THOMAS TURNER, a Bankrupt, v. WATSON. June 25.*

Since the statute 6 & 7 Vict. c. 85, the bankrupt is an admissible witness to prove the petitioning creditor's debt.

NOTICE having been given in this case to dispute the petitioning creditor's debt, the bankrupt was called at the trial, before CRESSWELL, J., at the sittings in London, in Trinity term, 1848, to prove it; when it was objected, on the part of the defendant, that the bankrupt was not a competent witness for that purpose, notwithstanding the 6 & 7 Vict. c. 85. *Udal v. Walton*, 14 M. & W. 254, was relied on for the plaintiffs, to show that the bankrupt was an admissible witness.

The learned judge admitted him, and a verdict was found for the plaintiffs, damages 60*l*.

Whitehurst, in the same term, obtained a rule nisi for a new trial, on the ground that the evidence of the bankrupt had been improperly received.

Byles, Serjt., and *Bovill*, in Trinity term last, showed cause. It may be conceded, that, before the passing of Lord DENMAN's act, the bankrupt was not an admissible witness to prove any of the requisites to support the commission. This was expressly so decided in *Chapman v. Gardner*, 2 H. Blac. 279, and also in two earlier cases of *Cross v. Fox*, Ib. 279 (a), and *Flower v. Herbert*, Ib. In *Morgan v. Pryor*, 2 B. & C. 14, 3 D. & R. 215 (*per nom. Morgan v. Price*), 3 Stark. N. P. C. 58, —where the bankrupt was called to prove the handwriting of the commissioners, in order *to identify the proceedings taken under the

***218]** commission against him,—BAYLEY, J., says: "I am of opinion that the bankrupt was a competent witness to prove that for which he was called, although incompetent to prove any fact necessary to support the commission. It has been said that it is too late now to inquire into the principle upon which a bankrupt has been held incompetent for that

purpose. I think it is also too late to extend the rule beyond the letter of former decisions. It appears to me that the rule was founded upon the principle of *interest* in the bankrupt. Before the 49 G. 3, c. 121, was passed, the assignees of a bankrupt were bound to produce witnesses to prove the trading, the petitioning creditor's debt, and the act of bankruptcy; and, if they were unable to do that, it formed a ground upon which the lord chancellor might possibly supersede the commission. That would render the certificate inoperative; and therefore the bankrupt was considered interested in the support of the commission. But, merely failing to prove the handwriting of the commissioners, is not a ground upon which the lord chancellor would think of superseding a commission. The principle upon which the former decisions proceeded does not, then, apply to this case; and the bankrupt was properly received as a witness." And HOLROYD, J., says: "It has been held, that, in actions by assignees, although the bankrupt may be a witness for other purposes, yet he cannot prove the act of bankruptcy, trading, or petitioning creditor's debt, because those circumstances are necessary, not only to the action, but to the commission itself. The case in 2 H. Bl. shows that the bankrupt was considered interested in proving each of those facts, lest proceedings should be had to supersede the commission; and, for that reason, he was considered as incompetent." [MAULE, J. The recent statute removes the objection to the bankrupt's *admissibility, on the ground of *interest*.] It is not easy to ascer- [*219
tain the exact principle upon which his exclusion rested: but at all events it is now removed. [WILDE, C. J. He was formerly excluded, as well on the ground of crime, as on the ground of interest.] Lord DENMAN's act removes both objections. That act recites, that "The inquiry after truth, in courts of justice, is often obstructed by incapacities created by the present law, and it is desirable that full information as to the facts in issue, both in criminal and in civil cases, should be laid before the persons who are appointed to decide upon them, and that such persons should exercise their judgment on the credit of the witnesses adduced, and on the truth of their testimony:" it then proceeds to enact, "that no person offered as a witness shall hereafter be excluded by reason of incapacity, from *crime* or *interest*, from giving evidence, either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or proceeding, civil or criminal, in any court, or before any judge, jury, sheriff, coroner, magistrate, officer, or person having, by law, or by consent of parties, authority to hear, receive, and examine evidence; but that every person so offered may and shall be admitted to give evidence on oath, or solemn affirmation in those cases wherein affirmation is by law receivable, notwithstanding that such person may or shall have an *interest* in the matter in question, or in the event of the trial of any issue, matter, question, or injury [inquiry], or

of the suit, action, or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any *crime* or offence." [MAULE, J. Crime or interest were not the only grounds of exclusion of witnesses: put the *220] case of husband and *wife.(a) The bankrupt may have been held incompetent on the ground of policy,—that a person who was about to sue out a commission, should not rely upon the bankrupt's evidence to sustain it.] The only authority for the position that public policy was the ground of rejection, is a note in Starkie's Law of Evidence.(b) In *Udal v. Walton*, 14 M. & W. 254, the bankrupt was called to prove notice to execution-creditors, of a prior act of bankruptcy; and also to prove the petitioning creditor's debt. It was objected that he was incompetent; but his evidence was received. Upon a motion for a new trial, POLLOCK, C. B., says: "I have no doubt that the evidence of the bankrupt was properly received. His testimony was tendered, not to support the commission, but to prove the petitioning creditor's debt. The question, therefore, as to his competency to support the commission, does not arise; he clearly is competent to prove collateral facts; and, in truth, this point was given up on the argument." And ALDERSON, B., says: "I do not see why he was not competent to prove even the act of bankruptcy." The statute, it is to be observed, is a remedial one. [WILDE, C. J. I do not think it remedies more evils than it creates.]

Whitehurst, in support of the rule. Before the passing of Lord DENMAN's act, a bankrupt was clearly an incompetent witness, either to support or to impeach the commission or *fiat*. That shows conclusively that *interest* could not have been the sole ground of exclusion. He was a competent witness for other purposes, whether for or against his assignees, provided he released the surplus. If *interest* had been the ground, his *221] exclusion would equally have extended to collateral *matters. And *crime* certainly was not the ground. The suggestion in the note in 2 Starkie on Evidence, p. 191 (d), is the correct one, viz. that the exclusion of the bankrupt rests on grounds of public policy: and to this ground of exclusion Lord DENMAN's act has no application. That statute does not apply, where the objection is to particular questions, and not to the general competency of the witness. [WILDE, C. J. Bankrupts have been called to prove fraudulent preference.] There seems to be some inaccuracy in the report of the case of *Udal v. Walton*: at all events, it is not an authority to the extent contended for in the present case.

Cur. adv. vult.

WILDE, C. J., now delivered the judgment of the court.

A rule nisi was granted in this case, to set aside the verdict for the plaintiff for 60*l.*, upon the ground that the bankrupt had improperly been admitted as a witness to prove the petitioning creditor's debt, the defend-

(a) See *Jourdain v. Lefevre*, 1 Esp. N. P. C. 66.

(b) 3d edit. Vol. II. p. 191, citing *Christian's Bankrupt Law*, 444.

ant having given notice of his intention to dispute it. And the only question for the consideration of the court is, whether the bankrupt was a competent witness to prove such debt: and that depends upon the construction of the 6 & 7 Vict. c. 85. The authorities were too numerous to admit of any question, as to the non-admissibility of the bankrupt as a witness to support or to negative either the trading, act of bankruptcy, or petitioning creditor's debt, before the passing of the statute referred to. The question, therefore, depends entirely upon the construction of that statute; which recites that the inquiry after truth is often obstructed by incapacities created by the present law, and that it was desirable that full information as to the facts in issue should be laid before the persons appointed to *decide upon them, and that such persons should [*222 exercise their judgment on the credit of the witnesses adduced, and on the truth of their testimony. It was therefore enacted that no person should thereafter be excluded, by reason of incapacity from crime or interest, from giving evidence upon the trial of any issue joined, but that every person so offered should be admitted to give evidence on oath, notwithstanding such person should have an interest in the matter in question, or in the event of the trial in which he should be offered as a witness, and notwithstanding such person should have been previously convicted of any crime,—subject to certain exceptions not material to the present case.

It has long been considered, and held as a settled rule, that the bankrupt was an incompetent witness upon the question of the validity of the commission or *fiat* in bankruptcy; and that although the question might be tried in an action or suit in the event of which the bankrupt had no interest: and it is, therefore, necessary to consider, for the purpose of deciding whether the statute in question has made the bankrupt a competent witness, upon what ground he was deemed to be incompetent before the statute,—the effect of that statute being, to render admissible persons who before its passing were inadmissible by reason of *crime* or *interest*.

In some cases, objection has been made to the bankrupt's being examined as to the act of bankruptcy, upon the ground that an act of bankruptcy was an offence or crime which might subject the party to forfeiture, and to which, therefore, he was not liable to be examined: and it would seem that a demurrer to a bill of discovery filed by the assignee under a commission of bankruptcy, against the bankrupt, seeking a discovery of the trading and act of bankruptcy, was, upon that ground, allowed so far as it related to the act of bankruptcy, but *over- [*223 ruled in regard to the discovery sought of the trading: *Chambers v. Thompson*, 4 Bro. C. C. 488.

The objection upon the ground that it may subject a witness to a charge of crime, or to a forfeiture, is, however, no objection to the admissibility of a witness, and is an objection that can be taken only by the witness himself, for his own protection,—except in certain cases of

conviction, not material to be adverted to. But the admissibility of the bankrupt upon any occasion as a witness in support, or against the validity, of the commission or *fiat*, has been put upon the ground of interest; and the exclusion has been carried, it is said, to an anomalous extent, inasmuch as a bankrupt is held to be inadmissible to *disprove* the bankruptcy, even after he had obtained a certificate, and thereby become discharged from his debts, and where, therefore, he would appear to have the strongest interest to support the bankruptcy: and the reason assigned has been, that a bankrupt stands in such a peculiar position that there are no means of deciding whether, in any given case, he has a greater interest to support or to defeat the bankruptcy; and, as the interest of various persons other than the litigating parties might be involved in the question of the validity of the bankruptcy, and by a *superseedeas* or establishment of the bankruptcy by means of the bankrupt's testimony, public policy has been said to require the exclusion altogether of his testimony upon the subject. This ground of exclusion is plainly referable to the presumption of a bankrupt's interest in the question, and that such interest had a tendency to bias his testimony, contrary to the truth of the facts upon which he might be examined.

Public policy has never been referred to as the ground of exclusion, *224] except in reference to the bias *from interest, to which his testimony might be supposed to be subject, and from the impossibility, of ascertaining whether that interest would be advanced or prejudiced by the testimony which the party tendering his evidence might anticipate he would give, and by reason of the possibility that the interest and rights of parties not before the court on the particular trial, might be affected consequentially by the testimony,—that is, by the bankruptcy being superseded or affirmed.

The exclusion of the bankrupt, therefore, being referable to the possible bias to which his testimony might be subject from his interest, it appears to be the object and intention of the statute referred to, that interest should no longer be a ground for excluding testimony in a judicial proceeding; and that, for the future, the existence of interest on the part of a person tendered as a witness, should have no other effect than upon the credit to be given to his testimony by the authority charged with the duty of determining upon its truth.

The text books, from the earliest period, contain little more than the statement that a bankrupt is an incompetent witness upon the question of bankruptcy or no bankruptcy; and a reference in detail to the numerous cases in which the doctrine has been acted upon (the result of which authorities we have before stated, and which does not seem to be open to any doubt), appears to be unnecessary.

We therefore think the evidence of the bankrupt in support of the petitioning creditor's debt, was properly admitted, under the authority of the statute before mentioned, and that the rule must be discharged.

Rule discharged.

*DUNCAN v. TOPHAM. *June 25.*

[*225

A contract to be performed "directly," means, to be performed, not "within a reasonable time," but "speedily," or, at least, "as soon as practicable."

On the 18th of February, the plaintiff wrote to the defendant, offering to supply him with linseed cake at 10*l.* 15*s.* per ton: on the 19th, the defendant replied, "I can take five tons at 10*l.* 10*s.*, but it must be put on board *directly*:" and on the 22d, the plaintiff again wrote, "I shall ship you five tons best cakes *to-morrow*:"—Held, that this correspondence did not prove a contract on the part of the defendant to accept cake "to be delivered within a reasonable time."

A contract is complete upon the posting by one party, of a letter addressed to the other, accepting the terms offered by the latter, notwithstanding such letter never reaches its destination.

ASSUMPSIT. The first count of the declaration stated, that, on, &c., the defendant bargained for and bought of the plaintiff, and the plaintiff, at the defendant's request, (a) then sold to the defendant, five tons of linseed cake, at and for the price or sum of 10*l.* 10*s.* for each and every ton thereof, *to be delivered by the plaintiff to the defendant within a reasonable time* in that behalf, and to be paid for, by the defendant to the plaintiff, on the delivery thereof: Mutual promises: Averment, that the plaintiff was, at all reasonable times after the making of the said contract, ready and willing to deliver the said linseed cake, and afterwards, to wit, on, &c., requested the defendant to accept the same, and to pay him the price thereof: Breach, that the defendant did not nor would, when he was so requested, or at any time, accept the said linseed cake, or any part thereof, or pay the plaintiff for the same, &c., but wholly neglected and refused so to do; whereby the plaintiff had incurred and been put to great expense in and about the carriage and conveyance of the said linseed cake, &c.

There was also a count for goods sold and delivered, and a count upon an account stated.

*The defendant pleaded,—first, non assumpsit,—secondly, to the first count, that the plaintiff was not ready and willing to deliver the said linseed cake, in manner and form as in the declaration alleged. [*226

Upon these pleas the plaintiff joined issue.

The cause was tried before CRESSWELL, J., at the summer assizes at York, 1848. The facts were as follows:—The plaintiff was an oil-cake merchant at Hull; the defendant was a farmer at Westkeal, near Coningsby, in the county of Lincoln. On the 18th of February, 1848, the plaintiff wrote to the defendant, offering to supply him with linseed cake at 10*l.* 15*s.* per ton. The defendant on the 19th answered,—I can take five tons of cake at 10*l.* 10*s.*; but it must be put on board *directly*, as it takes some time to get to Coningsby." On the 22d the plaintiff posted a letter at Hull, directed to the defendant, accepting his offer, in these terms:—"I shall ship you five tons best fresh made cakes *to-morrow*, at 10*l.* 10*s.*" This last-mentioned letter enclosed an invoice. On

(a) Unnecessary. Vide 4 Man. Gr. & S. 293, 5 M. & G. 267, n.

the 26th, the five tons of cake were put on board a boat called the William, belonging to one Ratcliffe, and bound for Lincoln, where it would have to be transhipped for Coningsby. The William did not leave Hull until the 28th of February; and, when the cake reached Coningsby, on the 17th of March, the defendant declined to receive it: and, on the 19th, he wrote to the plaintiff, saying, that, as he had received no answer to his letter of the 19th of February, he had bought other cake in the neighbourhood.

There was contradictory evidence as to whether or not the cake could have been sent earlier. Two witnesses called on the part of the plaintiff, stated that Martin's boat, which started about the time of the contract, and which went direct from Hull to Coningsby, was full, and consequently could not take the cake; *and that Dry's boat, which also started about the same time, was likewise full. On the other hand, Martin, who was called as a witness for the defendant, stated, that his boat was lying at Hull from the 21st of February until the 2d of March, when she sailed, not being full; that no application had been made to him to carry the cake in question; and that, in the ordinary course, goods sent by him would have reached Coningsby sooner than goods that went by Ratcliffe's boat on the 28th of February. The defendant also proved that he had actually bought other linseed cake on the 6th of March, for which he paid at the rate of 10*l.* 15*s.* *per* ton.

It was insisted on the part of the defendant, that there was a material variance between the contract alleged in the first count, and that proved, —inasmuch as the contract declared on, was a contract for goods to be transmitted *within a reasonable time*, whereas the evidence showed a contract to be performed *directly*.

The plaintiff's counsel declining to amend, the learned judge told the jury, that the meaning of the contract was, that the goods should be sent as early as was practicable, and that if, upon the evidence on both sides, they were of opinion that there had been a delivery or an offer to deliver the cake within a reasonable time, their verdict must be for the plaintiff. And he further told them, that, if the plaintiff's letter of the 22d of February, accepting the contract, was put into the post-office at Hull, and lost by the negligence of the post-office authorities, the contract would nevertheless be complete.

The jury returned a verdict for the plaintiff, damages 52*l.* 10*s.*

Martin, in Michaelmas term, 1848, moved for a new trial, on the ground of misdirection, and that the verdict was against the weight of *228] evidence. He submitted that *the plaintiff had incorrectly declared on, and the learned judge had incorrectly interpreted, the contract; for, that a contract to send goods "*directly*" did not mean that they should be sent "*within a reasonable time*," but "*immediately*" or "*speedily*." [MAULE, J. By the earliest opportunity.] Provided it be immediately. [WILDE, C. J. As soon as practicable, might be in

a month.] Or a year. The learned judge was also mistaken, in telling the jury that the contract was complete on the posting of the plaintiff's letter on the 22d of February, notwithstanding it might never have come to the defendant's hands. There is no authority for that position. [MAULE, J. I think it was the mode of proof in *Harvey v. Johnston*, 7 Man. Gr. & S. 295, 6 D. & L. 120. WILDE, C. J. There is also a case of *Dunlop v. Higgins*, 1 House of Lords Cases, 381, in the House of Lords, where the same point was decided.(a)]

The court took time to consider, and, on a subsequent day, intimated that the rule might go on the ground of the variance, but not as for a verdict against evidence, the learned judge who tried the cause expressing himself not dissatisfied with the conclusion the jury came to.

Knowles and *Hugh Hill* now showed cause. The contract is properly set out in the declaration. It is true the defendant's letter of the 19th of February annexes as a condition of the contract that the cake shall be delivered *directly*. But the term is ambiguous, and must be construed with reference to the surrounding circumstances: and, where there are no special circumstances, such as the contract having reference to *a [*229 commodity of a perishable nature, or the like, it must be understood to mean within a reasonable time. Thus, in *Moor v. The Mayor and Jurats of Hastings*, 2 Stra. 1070, Cas. temp. Hardw. 353, 362, it was held that a fine *certain* may be alleged as a *reasonable* fine. So, in *Bayley v. Tucker*, 2 N. R. 458, where the declaration stated that the defendant promised the plaintiff (bail of A.), in consideration of certain *reasonable* reward, to render A. within due time, according to the practice of the court,—it was held, *per* CHAMBRE, J., that evidence that a *specific* sum was agreed upon, was no variance. Again, in *Laing v. Fidgeon*, 6 Taunt. 108, 4 Campb. 169, a contract to furnish saddles at from 24s. to 26s., was held to be well declared upon as a contract to furnish them at a *reasonable* price. And in *Wickes v. Gordon*, 2 B. & Ald. 335, the contract laid in the declaration being, to deliver stock on the 27th of February, the contract proved, was, to deliver stock on the settling day, which, at the time, was fixed for, and understood by the parties to mean, the 27th February: and it was held,—overruling *Payne v. Hayes*, Bull. N. P. 145,—that the proof supported the declaration. [MAULE, J., referred to *Ellis v. Thompson*, 3 M. & W. 445.]

Martin and *Tomlinson*, in support of the rule. This is a contract for the sale of goods above the value of 10l., and therefore within the 17th section of the 29 Car. 2, c. 3. The delivery on board the boat at Hull, was not an acceptance: *Hanson v. Armitage*, 5 B. & Ald. 557, 1 D. & R. 128. The contract is contained in the two letters of the 19th and 22d of February. The defendant offers to take five tons of cake, provided it be shipped *directly*; and the plaintiff accepts that offer by say-

(a) On the authority of *Adams v. Linsell*, 1 B. & Ald. 681, and *Stocken v. Collin*, 7 M. & W. 515.

*230] ing on the 22d, "I *shall ship you five tons to-morrow." [MAULE, J. In effect, the plaintiff says,—“I accept your offer, and I mean to perform the contract by shipping the cake to-morrow.” The word “directly” does not necessarily mean “immediately:” it necessarily comprehends a certain space of time.] The contract, which was accepted on the 22d, was, for cake to be delivered on the following day: and that has not been performed. “Directly” means “forthwith,” or, “as soon as possible,” (a) which is very different from the construction contended for on the part of the plaintiff. The plaintiff has, by his letter of the 22d, put the true construction upon the terms of the defendant’s offer. At all events, the plaintiff was bound to ship the cake by the first available opportunity: and there was an opportunity of doing so on the 23d of February, of which he omitted to avail himself.

COLTMAN, J.(b) I am of opinion that there must be a new trial in this case. It appears to me that the declaration does not correctly describe the contract. The order given by the defendant was a conditional order, to send him five tons of cake, provided it could be shipped *directly*. That clearly means something different from a contract to be performed *within a reasonable time*.

MAULE, J. I am of the same opinion. I think this is a variance, and a variance which might and ought to have been amended at the trial. A “reasonable time” certainly means some more protracted space than “directly,” which is the term used in the defendant’s proposal.

*231] *CRESWELL, J. I agree with the rest of the court in thinking that the rule should be made absolute. It appears to me that “reasonable time” is a much more comprehensive expression than “directly.” It is true, as appears from *Thompson v. Gibson*, 8 M. & W. 281, 9 Dowl. P. C. 717, that “directly” does not mean “*instantly*:” and it may be subject to a similar limitation here. But the expression “within a reasonable time,” in this declaration, certainly is larger than is warranted by the terms of the contract.

I do not think the plaintiff lost anything by refusing to amend; for, if he had amended, the verdict would have been against him.

Rule absolute for a new trial.

(a) *Quere* as to the admissibility of the latter construction in the particular case. The defendant did not contemplate the possibility of the cake’s being shipped after the season for using it had passed.

(b) WILDE, C. J., was absent.

JUDITH GARRARD, Widow, Demandant, TUCK, Tenant. June 25.

In a writ and count in dower, the exact number of acres of land in respect of which dower is demanded, is not material: in order, therefore, to sustain a plea alleging that the tenements mentioned in the count were subject to an outstanding term, it is sufficient for the tenant to show that *all* the lands held by him in the parishes named in the count are subject to the term. Where an enclosure act provides that every proprietor shall stand and be seised of the lands to be allotted to him, to such and the same uses, and for such and the same estates, as the lands in respect of which such allotments shall be made, would have been subject to in case the act had not been made,—the allotments made under it are held subject to an outstanding term to which the original lands were subject.

Perfect identity of description and quantity is not, under such circumstances, necessary.

The surrender of a term assigned to attend the inheritance, is not to be presumed unless there has been a dealing with the estate in a way in which reasonable men would not have dealt with it unless the term had been put an end to.

The object of the statute 3 & 4 W. 4, c. 27, was, to settle the rights of persons adversely litigating with each other; not to deal with cases of trustees and *cœtui que trust*, where there is but one single interest, viz. that of the person beneficially entitled.

A *cœtui que trust* who enters into possession of land, becomes, at law, tenant at will to the trustee: where, therefore, the equitable owner of an estate, a term in which has been assigned to attend the inheritance, is in possession, the right of entry under the 2d section of the 3 & 4 W. 4, c. 27, accrues only upon the determination of the tenancy at will resulting from such possession.

The 3d section of the 3 & 4 W. 4, c. 27, does not apply to the case of a *cœtui que trust* holding possession of land under the trustee.

The court below refused to set aside a writ of error issuing out of the petty-bag office pursuant to the 12 & 13 Vict. c. 109, on the ground that it had been issued against good faith, and in contravention of an agreement entered into between the parties,—thinking that the court in which the writ was returnable alone had power to deal with it.

The Court of Exchequer Chamber declined to set aside a writ of error issuing out of the petty-bag office pursuant to the 12 & 13 Vict. c. 109, on the ground that it had been issued against good faith, and in contravention of an agreement entered into between the parties,—holding that the power so to deal with the writs was in the court below, or in a judge at chambers under a 37; the court of error not being a “superior court of common law,” within that statute.

The Exchequer Chamber, irrespectively of the statute 12 & 13 Vict. c. 109, has no jurisdiction to quash a writ of error,—except for a defect apparent on the face of it, or on the ground that the record is inconsistent with it.

THIS was an action by writ of dower *unde nihil habet*. The count stated that Judith Garrard, who was the wife of James Roberts Garrard, deceased, by A. S., her attorney, demanded against Charles Edward Tuck the third part of one messuage, one barn, one stable, one garden, one orchard, sixty acres of land, sixty acres *of meadow, sixty acres of pasture, sixty acres of arable land, sixty acres of woodland, [*232 and sixty acres of land covered with water, with the appurtenances, in the parish of Surlingham, in the county of Norfolk, and the third part of two acres of land, two acres of meadow, two acres of pasture, two acres of arable land, and two acres of woodland, with the appurtenances, in the parish of Rockland, in the county aforesaid, and the third part of two acres of land, two acres of meadow, two acres of pasture, two acres of arable land, and two acres of woodland, with the appurtenances, in the parish of Bramerton, in the county aforesaid, as the dower of the said Judith Garrard, of the endowment of the said James Roberts Garrard, deceased, theretofore her husband, whereof she had nothing, &c.

The tenant pleaded,—first, *dotum non*, because he said that the said

James Roberts Garrard, on the 18th of March, 1839,—being the time of suing forth the original writ of the said Judith Garrard in this action in this behalf, was not dead; concluding to the country.^(a)

*233] Secondly, that the said Judith Garrard ought not to *have her dower of the tenements aforesaid, with the appurtenances, of the endowment of the said James Roberts Garrard, theretofore her husband, otherwise than of the reversion thereafter mentioned, and of the rent incident thereto thereafter mentioned, because he said that the said tenements, with the appurtenances, were and are subject to a term of one thousand years, and that the said Judith Garrard was only entitled to be endowed of the reversion expectant on the determination of the said term, and of a peppercorn rent incident to the said reversion; and that this the tenant was ready to verify, wherefore he prayed judgment if the demandant ought to be endowed of the said tenements, with the appurtenances, as of the endowment of the said James Roberts Garrard, otherwise than of the said reversion and of the said rent incident thereto, &c.

The demandant joined issue on the first plea, and replied to the second, that she, by reason of anything by the tenant in that plea alleged, ought not to be barred from having her dower in the said tenements, with the appurtenances, of the endowment of the said James Roberts Garrard, formerly her husband, because she said that the said tenements, with the appurtenances, were not, either before or at the time of pleading the said last plea, subject to the said term of one thousand years; without this that the said tenements, with the appurtenances, were and are subject to the said term of one thousand years, and that she the said Judith Garrard is only entitled to be endowed to the reversion expectant on the determination of the said term and of the said peppercorn rent incident to the said reversion, in manner and form as in that plea alleged,—concluding to the country.

The cause was tried before POLLOCK, C. B., at the spring assizes at Norwich, in 1847. The facts are so fully stated in the judgment, that it is unnecessary to *repeat them here. At the close of the tenant's case, it was insisted on the part of the demandant,—first, that the term of one thousand years mentioned in the second plea, must be presumed to have been surrendered, on the authority of *Doe d. Putland v. Hilder*, 2 B. & Ald. 782,—secondly, that the plea should have stated that the tenements were subject to *the residue* of a term of one thousand years,—thirdly, that the rights of entry and of action, in respect of that term, were taken away by the statute 8 & 4 W. 4, c. 27, ss. 2, 7,—fourthly, that by the 8 & 9 Vict. c. 112, s. 1, the assignment of satisfied terms was unnecessary,—fifthly, that the term which the tenant had proved, was not a term in the land described in the count,—

(a) This conclusion appears to be bad in substance, as referring to trial by jury, a fact which ought to be tried by the court *per testes*. Com. Dig. *Pleader* (2 Y. 9). If the plea had been properly concluded, it could not well have been joined with the second plea,—in bar of execution,—any issue arising out of which must have been tried by the country.

sixthly, that, assuming that the lands allotted under two acts for the enclosure of lands in the parishes of Surlingham and Rockland, respectively, 48 G. 3, and 49 G. 3 (which, with the awards made under them, had been put in by the tenant), had belonged to James Roberts Garrard, it was not shown that the lands in respect of which the allotments were made, were the lands now in question, and therefore it did not follow that the term would subsist in the new allotments.

A verdict was found for the demandant, with leave reserved to the tenant to move that the verdict might be entered for him on the second issue, if the court should be of opinion that the second plea was made out,—and leave to the demandant to move to enter up judgment *non obstante veredicto*, if the tenant's motion to enter the verdict on the second issue should be successful.

Byles, Serjt., accordingly, in Easter term, 1847, on the part of the tenant, obtained a rule to show cause *why the verdict found for the defendant on the second issue should not be set aside, and [*235 instead thereof a verdict be entered for the defendant; or for a new trial, upon affidavits. As to the presumption of a surrender of the term, he referred to the cases collected in Sugden's Vendors and Purchasers,^(a) and to *Doe d. Blacknell v. Plowman*, 2 B. & Ad. 573, as virtually overruling *Doe d. Putland v. Hilder*. As to the objection that the term proved was not a term in the lands in the count, he submitted that the defect, if any, arose from the defective way in which the demandant had herself described the lands; and that if the description was too general, the judgment ought to be arrested,—citing Com. Dig. *Pleader* (2 Y. 2). And, as to the last objection urged at the trial, he referred to the various provisions of the local enclosure acts, and to the 14th section of the general enclosure act, 41 G. 3, c. 109, as showing that the new allotments followed the title of the lands in respect of which they were made.

O'Malley and Wiles, in Trinity term, 1848, showed cause. To entitle him to a verdict on the second issue, the tenant was bound to show, in the terms of that issue, a term of years covering all the lands of which James Roberts Garrard was seised, out of which the demandant claimed to be endowed: Robinson's Entries, 237, 254, 257, 277, 279; Lilly's Entries, 187; Com. Dig. *Pleader* (2 Y. 7); Roscoe on Real Actions, 179, 219, 329, 332; Rogers v. Custance, 1 Q. B. 77, 4 P. & D. 574; Cousins v. Paddon, 2 C. M. & R. 547, 5 Tyrwh. 535; Tuck v. Tuck, 5 M. & W. 109, 7 Dowl. P. C. 373; Moore v. Butlin, 7 Ad. & E. 595, 2 N. & P. 436. *This difficulty, it will be urged, the tenant would have avoided, if he had been permitted to plead, as he had pro- [*236 posed,—first, *ne unques seisie que dower*,—secondly, that the husband was alive at the time of suing forth the original writ,—thirdly, the term of one thousand years. It is obvious, however, that these pleas could

(a) 10th edit., Vol. III. pp. 24—69. And see Dart's Compendium of Law and Practice of Vendors and Purchasers, 160 (c).

not have been pleaded together, inasmuch as they would have required different modes of trial,—the second, *per testes*, and the others by a jury: (a) Com. Dig. *Pleader* (2 Y, 9); 2 Wms. Saund. 44 c.; Booth on Real Actions, 168; Roscoe on Real Actions, 219, 220; Abbot of Strata Marcella's case, 9 Co. Rep. 80 b.; Lindsey v. Lindsey, 1 Salk. 291, per nom. Booth v. The Marquess of Lindsey, 2 Ld. Raym. 1298; Davies, dem., Lowndes, ten., 7 M. & G. 762, 8 Scott, N. R. 589.

The effect of the general enclosure act of 41 G. 3, c. 109, is, to exclude all persons who omit duly to prefer their claims: Doe d. Watson v. Jefferson, 2 Bingh. 118, 9 J. B. Moore, 260; and here, no claim was made in respect of the term of one thousand years created by the deed of 1789: and, although there are provisions in the local acts produced at the trial, that every proprietor shall stand and be seised of the lands to be allotted to him, to such and the same uses, and for such and the same estates, as the lands in respect whereof such allotments shall be made, would have been subject to in case the acts had not been passed; yet these provisions do not embrace an attendant term. [MAULE, J. The policy of all enclosure acts, as well public as private, is, that the land acquired under the award of the commissioners, shall differ from that in respect of which the allotment is made, in its physical qualities only. WILDE, C. J. Is it not a fallacy to say that the trustees of the term did not claim? A claim by the *cestui que trust* is a claim by the trustees.]

*237] *The jury were warranted in presuming a surrender of the term, from the lapse of time, and from the fact of two deeds having since been executed by the parties, in which the term is not alluded to, viz. the mortgage of 1812, and the conveyance by James Roberts Garrard to the trustees for sale, in the same year: Doe d. Putland v. Hilder, 2 B. & Ald. 782, Doe d. Burdett v. Wrighte, 2 B. & Ald. 710, Bartlett v. Downes, 8 B. & C. 616, 5 D. & R. 526, Townsend v. Champenown, 1 Y. & J. 588, Doe d. Hammond v. Cooke, 6 Bingh. 174, 3 M. & P. 411. Doe d. Putland v. Hilder has repeatedly been cited without disapprobation.

Twenty years having elapsed since the right of entry first accrued to the trustee of the term, the term is gone, by the operation of the statute of limitations of 8 & 4 W. 4, c. 27, ss. 2, 8, 7. In Doe d. Jacobs v. Phillips, 10 Q. B. 180, 16 Law Journ. N. S., Q. B. 268, 11 Jurist, 692, the facts were these:—In 1767, the residue of a satisfied term of 500 years (created in 1766) was assigned to a trustee for H., to attend the inheritance: in 1844, the administrator of the trustee brought ejectment on behalf of persons who claimed the beneficial interest through H., the defendants also claiming it under title derived through H.: the owner of the legal interest in the term had never been in possession: no demand of possession had been made before action brought:—and it was held that

(a) Vide *supra*, 232 (a).

the action was not maintainable; for, if a tenancy at will existed, as between the trustee and *cetteux que trust*, it had not been determined by demand of possession, and if no tenancy existed so as to render a demand of possession necessary, then the action might have been brought twenty years before, and was, consequently, barred by the 2d and 3d sections of the statute.

*Further, the term is extinguished and gone, by virtue of the 8 & 9 Vict. c. 112, s. 1, by reason of its being no longer necessary. [*238
[This point was abandoned.]

Byles, Serjt., and *Unthank*, in support of the rule. It is at the least extremely doubtful whether the statute 3 & 4 W. 4, c. 27, applies at all as between trustee and *cestui que trust*: (a) and, if it does, the question cannot be raised by a stranger. It has long been settled, that the possession of the *cestui que trust* is the possession of the trustee. If any legal relation is supposed to exist between them, it is that of tenant at will: Littleton, §§ 462, 463; Com. Dig. *Estate* (H. 1); Sugden's *Vendors and Purchasers*, 11th edit. p. 610; *Vallance v. Savage*, 7 Bingh. 595, 5 M. & P. 576. In the last-mentioned case, TINDAL, C. J., says: "The evidence was, that John Vallance, the plaintiff, was a trustee, and that James Vallance was his *cestui que trust*, and had let the premises in question to Sarah Pell, from whom he received the rent. It was therefore the simple case of trustee and *cestui que trust*. The legal interest is in the trustee; actions must be brought by him; the *cestui que trust* has no interest in law: if he enters, his possession is considered the possession of the trustee; and any disposition made by him, and adopted by the trustee, is considered as the disposition of the trustee, the *cestui que trust* only possessing the property in the right of the trustee." The statute 3 & 4 W. 4, c. 27, was passed to regulate all estates, in law as well as in equity. The second section enacts, that, after the day therein mentioned, "no person shall make an entry or distress, or bring an action, to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to *bring such action, shall have first accrued to some person through whom he claims; or, if such right shall not have accrued to any [*239 person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same." Under the old statute of limitations, 21 Jac. 1, c. 16, the question of adverse possession was a most material one: and there is no appreciable distinction between the words of the first section of that statute, and those of the second section of the 3 & 4 W. 4, c. 27. The seventh section enacts, "that, when any person shall be in possession, or in receipt of the profits, of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person

(a) See Dart's *Compendium of Law and Practice of Vendors and Purchasers*, 191.

through whom he claims, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued, either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined." But, at the end of the clause, there is this express proviso, "that no mortgagor or *cestui que trust* shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee." In *Nepean v. Doe d. Knight*, 2 M. & W. 894,—where it was held that the doctrine of non-adverse possession is done away with by the 3 & 4 W. 4, c. 27, ss. 2, 3, except in the cases provided for by s. 15,—it was admitted that the possession was adverse, and the case exactly within the 3d section. In *Doe d. Corbyn v. Bramston*, 3 Ad. & E. 63, S. C. *per nom.* *Doe d. Corby v. Bransom*, 4 N. & M. 664, a feme sole, seised in fee, married, and she and her husband ceased to be in possession *or enjoyment of the land, and *240] went to reside at a distance from it: they both died at times which were not shown to be within forty years from their ceasing to occupy: the wife's heir-at-law brought ejectment against the party in possession, within twenty years of the husband's death, and within five years of the passing of the statute 3 & 4 W. 4, c. 27, but more than forty years after the husband and wife ceased to occupy: and it was held, that the heir-at-law was barred by the 17th section of the statute, though it did not appear when or how the defendant came into possession, and though proof was offered that the wife had levied no fine. Lord DENMAN, in delivering the judgment of the court, there says: "The fact being clear, that, within the terms of 3 & 4 W. 4, c. 27, s. 3, the plaintiff's mother was dispossessed, or discontinued the possession or receipt of the rents, above forty years before the action brought, the action is clearly barred by s. 17 of the same statute. Some argument was raised on the question whether the possession was adverse or not; but the terms of that clause are unequivocal, and one of its objects was, to avoid the necessity of inquiring into facts of so ancient a date." PATTERSON, J., observing upon this statute, in *Doe d. Jones v. Williams*, 5 Ad. & E. 291, 6 N. & M. 816, says: "From the language of the 15th section, it plainly appears that something or other was, after the act passed, to be considered as adverse possession, which was not so before the act passed; for, in that section, it seems to be considered that the possession, which, up to the passing of the act, was not adverse as the law then stood, would, by the operation of the act, become so on the very day after the act passed; and that by relation; otherwise the provision as to the five years, was not needed to protect the right of the party against whom such *241] *adverse possession might be set up. What is 'adverse possession at the time of the act passing,' in the sense of that section, depends therefore upon the law as it stood up to that time. One is much

at a loss as to the proper terms in which to describe the relation of mortgagor in possession and mortgagee. In *Partridge v. Bere*, 5 B. & Ald. 604, such mortgagor is held to be tenant to the mortgagee; sometimes he is said to be the bailiff of the mortgagee; and, in a late case, (a) Lord TENTERDEN said that his situation was of a peculiar character. But it is clear that his possession is, at all events, not adverse to the title of the mortgagee; and therefore I think that the 15th section applies to the present case. How far, under the 8d section, it is necessary for the mortgagee to bring his action within twenty years from the day of default, I cannot say: I do not see my way at all. (b) If the 8d section was intended to comprehend the case of a mortgagee, it is very ill penned; and the 40th section, if meant to apply to actions of ejectment, is still worse penned." Lord DENMAN, in delivering the judgment of the court in *Culley v. Doe d. Taylerson*, 11 Ad. & E. 1008, 3 P. & D. 539, says: "The effect of this (the 2d) section (of the 3 & 4 W. 4, c. 27) is, to put an end to all questions and discussions whether the possession of land, &c., be adverse or not; and, if one party has been in the actual possession for twenty years, whether adversely or not, the claimant, whose original right of entry accrued above twenty years before bringing the *ejectment, is barred by this section." [MAULE, J. In all [*242 these cases, the party came within the description of a person [*242 dispossessed.] In *Doe d. Jacobs v. Phillips*, the plaintiffs were trustees for two infants: the estate was gavelkind: both trustees and *cetteux que trust* had been kept out of possession more than twenty years, by the uncles and aunts of the latter. (c) [MAULE, J. If not barred in twenty years, they never would be. COLTMAN, J. The uncles and aunts were co-parceners: the case, therefore, came within the 12th section. (d)] No doubt. The remarks upon this statute by TINDAL, C. J., in *James v. Salter*, 8 N. C. 544, 4 Scott, 168, and those contained in the notes to *Nepean v. Doe d. Knight*, in *Smith's Leading Cases*, 8d edit. vol. II. p. 396, et seq., are much to the purpose.

Whether or not a surrender of a term ought to be presumed, is ordinarily a question for the jury: *Doe v. Scott*, 11 East, 478; *Jenkins v. Harvey*, 1 C. M. & R. 877; *Best on Presumptions*, pp. 165, 166. The circumstance of the existence of the term not being noticed in the will

(a) Perhaps *Doe d. Roby v. Maisey*, 8 B. & C. 767, 3 M. & R. 107.

(b) The 7 W. 4 & 1 Viet. c. 28, regulates the time at which entry may be made, or action brought, by a mortgagee of land within the definition of the 3 & 4 W. 4, c. 27, s. 1, giving twenty years from the last payment of any part of the principal or interest, although the right of entry may have first accrued more than twenty years before.

(c) See 8 Q. B. 158, and 11 Jurist, 692.

(d) Which enacts, "that, when any one or more of several persons entitled to any land or rent, as co-parceners, joint-tenants, or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons, or any of them."

of Thomas Bowles in 1762, and of James Roberts in 1798, or in the mortgage to Thomas Bignold, in 1812, or the conveyance to trustees for sale, in the same year, affords no valid ground for presuming that the *248] term created by Sarah *Thurston, in 1789, had ceased to exist. It could not be expected that the term would be mentioned in the wills: and, in practice, it is not usual, in the case of a mortgage, to get in an outstanding term, especially if it be an old one: Sugden's Vendors and Purchasers, 11th edit. p. 1134. Of the seven cases upon the subject, to which Sir E. Sugden refers, (a) in three of them there were outstanding terms, of which no notice was taken. No doubt, it is more prudent in all cases to get in the term; but it is not so universally the practice to do so, as to warrant an inference being drawn from the non-observance of that precaution. It was not until the decision in *Mole v. Smith*, 1 Jac. 490, (b) that it was considered that a purchaser was obliged to take an estate protected from dower by a term.

As to the identity of the lands,—the quantities and descriptions are as nearly identical as could, under the circumstances, be reasonably looked for, regard being had to the fact, that, under the two enclosure acts, sixteen new public, and thirty-two private roads have been set out; and that, under those acts, lands were exchanged as well as newly allotted, and no distinction between allotments and exchanges was made in the awards of the commissioners.

It was not necessary for the defendant to show a term covering a quantity of land equal to that mentioned in the count. The writ and count in dower resemble the writ and declaration in assumpsit, rather *244] than in debt, where the writ used to be for a particular *sum. In a writ of right, the demandant claims specific land: in dower, the writ merely claims a reasonable endowment out of the lands which belonged to the husband; and, when she comes to count, the demandant may abridge her claim; or she may recover on the trial, although she may fail in proof as to part: *Williams v. Gwyn*, 2 Wms. Saund. 44 a, and the notes; *Littleton*, § 89; *Co. Lit.* 84 b, 281. [MAULE, J. The question is, whether it was not necessary for the tenant to plead the term as to so much, and *ne unques seisie que dower* as to the residue. Dower does not very much resemble either debt or assumpsit: in debt, the plaintiff claims a certain sum of money; in assumpsit, he claims compensation for the non-performance of a contract or promise. But, where land, or dower out of land, is claimed, it has reference to some particular and specific land.] There are three cases in *Style* to that effect,—*Thynn v. Thynn*, *Style's Rep.* 99; *Fairfax v. Fairfax*, *Ib.* 238; and *Booth v. Lambert*, *Ib.* 276. The tenant clearly proved the substance of the issue.

(a) *Goodtitle v. Morgan*, 1 T. R. 755, *Doe d. Putland v. Hilder*, 2 B. & Ald. 782, *Willoughby v. Willoughby*, 1 T. R. 763, *Keene v. Deardon*, 8 East, 248, *Maundrell v. Maundrell*, 10 Ves. 246, *The Marquess of Townshend v. The Bishop of Norwich*, MS., 27th Jan. 1820, *Cholmondeley v. Clinton*, 3 Jac. & W. 158.

(b) And see *Dart's Compend. Vend. & P.* 251.

If necessary, the verdict on the second issue may be entered distributively, for the tenant as to part, and, as to other part, for the demandant. For this the authorities are numerous: Co. Litt. 227 a; Com. Dig. *Pleader* (S. 19); Bac. Abr. *Verdict* (M.), (Q.); *Bates v. Bates*, 1 Lutw. 719; *Wheatley v. Best*, Cro. Eliz. 564, Noy, 65; *Pheasant v. Pheasant*, 1 Ch. C. 181; *Tiffin v. Tiffin*, 2 Freeman, 66; *Hooper v. Shepherd*, 2 Stra. 1089; *Benington v. Benington*, Cro. Eliz. 157; *Spilsbury v. Micklethwaite*, 1 Taunt. 146; *Timothy v. Simpson*, 1 C. M. & R. 757; *Rodgers v. Maw*, 15 M. & W. 444.

Cur. adv. vult.

*WILDE, C. J., now delivered the judgment of the court, after [*245 stating the pleadings.

On the trial of the cause, a verdict was found for the demandant, with leave to the tenant to have the verdict entered for him on the second issue, if the court should be of opinion that he had made out his plea. A rule nisi was accordingly granted, for entering the verdict for the tenant on the second issue.

It was insisted, on the argument, that, inasmuch as the number of acres specified in the count amounted to 500, the tenant was bound to show a term of years covering 500 acres of land, in order to make out his plea. But we do not assent to this position. The writ of dower is brought for the third part of specific lands in the tenure of the tenant; and, though the writ, in conformity with the established forms of writs, demands a certain number of acres, yet we do not consider the exact number of acres to be material.

The effect of the pleadings in the case, we conceive to be this:—The tenant not having pleaded *ne unques seisie que dower*, has thereby admitted that the demandant's husband was seised of all the lands in respect of which dower is demanded; and the demandant has the right to apply her demand to any lands in the tenure of the tenant, which the demand, as framed, is capable of covering,—that is, under the circumstances of this case, to all the lands of the tenant in the parishes of Surlingham, Rockland, and Bramerton: consequently the tenant, who by his plea has undertaken to show that the lands demanded are covered by the term of one thousand years, has, in effect, bound himself to show that all his lands in those parishes are covered by the term.

The term relied upon by the tenant was originally granted, in 1739, by Sarah Thurston (then being seised in fee of thirty-two pieces of land, containing by *estimation thirty-seven acres, and one other piece of land of uncertain quantity) to Thomas Seaman, for securing a [*246 sum of money,—by the description of all those thirty-three pieces, &c. (particularly describing them), and all other the messuages, &c., lands and hereditaments, of her the said Sarah Thurston, situate, lying, and being in Surlingham St. Mary, Surlingham St. Saviour, Rockland, and Bramerton. In 1746, Seaman assigned the mortgage to one Anthony Aufriere. In 1750, Sarah Thurston conveyed the mortgaged premises,

in fee-simple, to one Thomas Bowles, by whom the mortgage was paid off; and thereupon Aufrere assigned the term to John Kerridge, in trust to attend the inheritance. Thomas Bowles, by will, dated the 27th of December, 1762, devised all his messuages, lands, tenements, and hereditaments, in Surlingham, or in any other town next or near adjoining, which he had purchased of Sarah Thurston, widow, and all other his messuages, lands, tenements, and hereditaments whatsoever, situate, lying, and being in Surlingham aforesaid, to James Roberts and his heirs. James Roberts, by his will, dated the 17th of October, 1798, devised all his messuages, lands, tenements, and hereditaments in Surlingham, Rockland, Bramerton, Kimpnall, Fritter, and Topcroft, in the county of Norfolk, and all other his real estates whatsoever, to James Roberts Garrard (the husband of the demandant), and his heirs for ever, subject to an executory devise over on a contingency which never occurred. In January, 1812, James Roberts Garrard demised all his freehold or charter-hold messuages, lands, tenements, and hereditaments in Surlingham, Rockland, and Bramerton, and in Fritter, Topcroft, and Kimpnall, to Thomas Bignold, for a term of years, to secure a sum of money. In October, 1812, James Roberts Garrard conveyed to Farr and Fiske all his freehold or charter-hold messuages, lands, *tenements, and hereditaments in Surlingham, Rockland, and Bramerton, and any other town thereto next or near adjoining, in trust to sell, and pay debts. In May, 1813, Farr and Fiske, and James Roberts Garrard and Thomas Bignold, conveyed to Thomas Tuck (the tenant) so much as was freehold or charter-hold of and in all that messuage or dwelling-house in Surlingham, and various pieces of land particularly described, in Surlingham, Bramerton, and Rockland, amounting in the whole to near forty-eight acres: and, at the same time, one Edward Bickersteth (to whom a special administration had been granted of the goods of John Kerridge, so far only as concerned the rights and title of John Kerridge of and in the hereditaments comprised in the said term for one thousand years) assigned over the messuages, lands, &c., vested in Bickersteth, as administrator, for the residue of the term of one thousand years, to William Farrer, in trust for Thomas Tuck, and to attend the inheritance.

On the part of the demandant, it was contended, that, as a portion of the land conveyed by the demandant's husband to Tuck, was land allotted under certain acts which had been passed for enclosing lands in the parishes of Claxton and Rockland, and in the parishes of Strumshaw and Surlingham, that land was not subject to the term to which the lands in lieu of which it was allotted had been subject.

But we think there is no ground for doubt on this point, it being expressly provided by each of those acts that every proprietor shall stand and be seised of the lands to be allotted to him, to such and the same uses, for such and the same estates, and no other, as the lands in

respect whereof such allotments shall be made would have been subject to in case the act had not been made.

It was further objected, that the lands conveyed to Tuck did not correspond in quantity exactly with the *ancient estimated quantities; nor could the land in respect of which the allotments were [*248 supposed to have been made, be precisely identified. It cannot be expected but that such should be the case, there having been two enclosure acts passed affecting the lands, under which many new roads had been set out, and allotments made. Neither the exact quantities, nor the ancient descriptions, under such circumstances, are likely to correspond entirely. But it was proved, with reasonable certainty, in this case, that the whole of the land comprised in the term created by Sarah Thurston, came to James Roberts Garrard: and, in the absence of any ground for inferring that he had any other lands in Surlingham, Rockland, and Bramerton, besides those which he derived from Mrs. Thurston, there was, we think, reasonable ground on which a jury might and ought to infer the identity of the lands in the tenure of the tenant, with those comprised in the lease for one thousand years.

But it was further contended, on behalf of the demandant, that, as the existence of the term was never referred to in any of the deeds, from the time when it was assigned to Kerridge to attend the inheritance, in 1750, down to the year 1813, when the conveyance was made to Tuck, it ought to be presumed that it had been surrendered.

It is undoubtedly true, that surrenders of outstanding unsatisfied terms have been in several cases presumed, to prevent what was deemed to be a failure of justice,—as was done in *Doe d. Burdett v. Wrighte*, 2 B. & Ald. 710, and *Doe d. Putland v. Hilder*, 2 B. & Ald. 782. But the doctrine laid down in those cases,—as was said by Lord TENTERDEN, in *Doe d. Blacknell v. Plowman*, 2 B. & Ad. 577,—has been much *questioned: and the current of the later authorities shows, that, [*249 where a term has been assigned to attend the inheritance, a surrender ought not to be presumed, unless there has been a dealing with the estate in a way in which reasonable men and men of business would not have dealt with it, unless the term had been put an end to. Now, what are the acts done since the assignment of this term? The first of these acts is the will of Bowles. There was no reason why, in making his will, he should refer to the term which was held in trust for him, and would be equally held in trust for his devisee. The same observation applies to the next act,—the will of James Roberts.

The next occasion was, in 1812, when the property was mortgaged to Bignold, without any assignment to a trustee for Bignold. But it is to be observed that Bignold had full notice of the mortgage term; for, the mortgagor's title could not be made out without producing the conveyance to Bowles, on the face of which the mortgage to Aufrere appears as an encumbrance. The mortgagee would, of course, call for the assign-

ment to Kerridge, and would be entitled to the custody of it for his security. The mortgage-deed conveys to the mortgagee the lands of the mortgagor wherein he, or *any person in trust for him*, hath any manner of estate; and there is a covenant for further assurance by all persons lawfully or equitably claiming any estate or interest therein. The security, under these circumstances, might well be deemed sufficient, without calling on the mortgagor to incur the unnecessary expense of searching after, and finding, the representative of Kerridge; and therefore we do not think that the absence of an assignment leads to the inference that a surrender had taken place.

The next act done, was, in October, 1812, when the estate was conveyed to trustees for sale. But we see *no reason why an assignment of the term should be made to protect their estate, which they held for a temporary purpose only; and we find, that, as soon as that purpose could be carried into effect, a limited administration was obtained, and the term was assigned to the purchaser. We think, therefore, that, under the circumstances of this case, there is no ground for presuming a surrender.

It was further objected, that the term was extinguished, by force of the statute 3 & 4 W. 4, c. 27. The construction contended for leads to consequences so extensive and so alarming, that it ought not to be adopted, unless it is plain that such was the intention of the act. The consequence would be, in the majority of cases, to extinguish attendant terms, and shake the security of titles to an extent which it is impossible to estimate, and which it is difficult to suppose the framers of the act could have intended. The general object of the act seems to have been, to settle the right of persons adversely litigating with each other; not to deal with cases like that of trustee and *cestui que trust*, where, though there are two parties, there is but one single interest,—that of the person beneficially entitled.

It will be convenient, before adverting further to the statute, to consider in what relation the parties stood at the time the act passed. The mortgage term being satisfied out of the purchase-money of the inheritance, and the term assigned over expressly to attend the inheritance, the assignee thereby became trustee, and the purchaser *cestui que trust* during the term; and, the *cestui que trust* entering into possession of the land, he was, at law, the tenant at will to the trustee: *Freeman v. Barnes*, 1 Vent. 80, 1 Siderf. 349, 458.

*251] *Such being the relation of the parties, what is the operation of the act?

By section 2 it is enacted that no person shall make an entry, or bring an action, to recover any land, but within twenty years next after the time at which the right to make such entry, or bring such action, first accrued.

Now,—pausing at this section,—at what time, as between lessor and

lessee, is it to be understood that the right of entry accrues? The right of entry of a landlord on his tenant, must accrue on the expiration of the tenant's term, if he has a term: if he is a tenant at will, the right of entry, within the terms of this section of the act, would naturally be understood to accrue on the determination of the tenancy at will. It may be said, indeed, that, as, in case of a tenancy at will, the lessor may at any time determine his will by entering, a right of entry exists at all times, from the first commencement of the estate at will, and is not dependent on a previous determination of the estate at will. But we think that the term "right of entry," in the 2d section, ought not to be so construed. The right which a lessor has in such a case, is, a right to determine the tenancy at will; and it is only upon the determination of the tenancy at will, that there is such a vested right of entry as is in contemplation in the 2d section of the act. This view appears to be confirmed by the provision in the 7th section, respecting tenancies at will,—which provides, in cases of ordinary tenancies at will, that the right to make an entry shall be decreed to have first accrued, either at the determination of the tenancy, or at the expiration of one year next after the commencement of such tenancy. The object of that section obviously is, to fix a definite period after the commencement of a tenancy at will, beyond which the *tenancy shall not be presumed to have had a [*252 continuance,—a provision which would have been wholly unnecessary, if a right of entry, within the meaning of the 2d section, had at all times existed, from the very commencement of the estate at will.

But, passing from the 2d to the 3d section of the act, it is contended that the present case falls within that clause of the 3d section which provides, that, where the person claiming such land, shall claim in respect of an estate or interest in possession, granted, by any instrument, to him, or some person through whom he claims, by a person being, in respect of the same estate or interest, in the possession or receipt of the profits of the land, and *no person entitled under such instrument* shall have been in such possession or receipt; then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument. But we do not think that the case of a *cestui que trust* holding possession of land under the trustee, falls within this clause, which is meant to apply to cases where the person holding the land does not hold it under, or in privity with, the person in whom the right of entry is supposed to be. The *cestui que trust* in such a case holds possession under the trustee, and under the protection of the instrument by which the estate is conveyed to the trustee. It cannot, therefore, be said that it is a case in which "no person entitled under the instrument" has been in possession; for, the *cestui que trust* has virtually been in possession under the instrument.

If we proceed to the consideration of the provision contained in the

7th section, respecting trustees,—that provision appears to us to reflect light on the nature of their estate, and on the provisions of the 2d and 3d sections, as far as their estate is concerned.

*253] *The object of that section appears to be (as above stated), to fix a definite period, at the end of which the right of entry of the lessor, as against his tenant at will, shall be deemed to have accrued; and it provides that no *cestui que trust* shall be deemed to be a tenant at will *within the meaning of that clause*,—which is equivalent to saying that the right of entry of a trustee against his *cestui que trust*, shall not be deemed to have first accrued at the expiration of one year next after the commencement of the tenancy; and the exception seems to be introduced in order to prevent the necessity of any active steps being taken by a trustee to preserve his estate from being destroyed, as in the case of an ordinary tenancy at will, by mere lapse of time. The intention appears to be, to put the estate of a trustee in a *better* state in this respect than that in which the estate of an ordinary lessor is, as against his tenant at will; whereas, his situation would be *worse* than that of an ordinary lessor, on the construction contended for on the part of the demandant in this case; for, the time of limitation, on the construction contended for, would run against the trustee from the first commencement of his estate; whereas, as against an ordinary lessor, the time would only run from the actual determination of the tenancy, or from the end of the first year of the tenancy.

On the part of the demandant, the case of *Doe d. Jacobs v. Phillips*, 10 Q. B. 130, 16 Law Journ., N. S., Q. B. 268, 11 Jurist, 692, was relied on, as being at variance with the view we take of the statute. The facts of that case are not given in detail; so that it does not appear whether the *cestui que trust* in that case had been in possession of the lands within twenty years, or, indeed, that they had ever been in possession. In the absence of more information than we possess regarding that case, *we do not look upon it as binding us: and on the best *254] consideration we can give to the subject, we think that the term in the present case has not been extinguished by force of the statute in question.

The result is, that, on the second issue, the verdict must be entered for the tenant.

Rule accordingly.

Nov. 9. Judgment having on the 23d of October, 1849, been entered for the tenant(a) on the second issue, the demandant brought a writ of error, on the ground that the matters contained in the second plea did not disclose a sufficient answer in law to her claim, and that on the

(a) The proper judgment on this verdict would be, for the demandant, *quod recuperet*, with a *cesset executio*.

ground, amongst others, that it did not show whether the term therein mentioned, had been created previously to, or after, the marriage of the demandant with James Roberts Garrard; and that therefore she, the demandant, was entitled to judgment *non obstante veredicto* on that plea.

Byles, Serjt. (with whom was *Unthank*), now moved for a rule calling upon the demandant to show cause why the writ of error should not be set aside, on the ground that it was issued against good faith,—upon an affidavit stating in substance, that the proceedings in this cause originated in the court of Chancery, where a bill had been filed by the demandant, Mrs. Garrard, against the tenant, C. E. Tuck, to recover her dower in the lands mentioned in the count; that the defences set up by the now tenant (the defendant in equity) were two,—first, that the demandant's husband did not appear to be dead,—secondly, that the lands were protected against the claim of dower by a term of one thousand years, *created by one Sarah Thurston by deed dated the 6th of June, 1739; that [*255 the present action was brought pursuant to an order of Vice-Chancellor KNIGHT BRUCE made in that cause, in 1846; that, on the 4th of March, 1847, the tenant pleaded,—first, a denial of the death of the husband,—secondly, the statute of limitations,—thirdly, that Sarah Thurston, in 1739, being seised in fee, created a term of one thousand years, and tracing the term down to the time of pleading; that part of the lands in respect of which dower was claimed, were not originally in the seisin of Sarah Thurston, or included in the term, but were allotments in respect of lands that were included in the term,—it being assumed, on all hands, that, if the term protected the lands of which Sarah Thurston was originally seised, it also protected the allotted lands; that the plea of the statute of limitations was afterwards withdrawn, pursuant to a judge's order made by consent; that, difficulties arising in framing the pleadings, and particularly with reference to the enclosure acts, it was ultimately agreed between the respective attorneys, assisted by counsel, that the pleas and replication should be in the short form in which they now appear upon the record,—upon an understanding that the real question to be tried on the second plea, was, whether or not the term created in 1739 had ceased; that the only ground of error relied on, was, an objection to the form of the second plea so agreed to as aforesaid. [WILDE, C. J. We have no power to do what you ask.] The writ issues out of the petty-bag office, under the provisions of the 12 & 13 Vict. c. 109; it is directed to this court,(a) and is returnable in the Exchequer Chamber. It is submitted that the court to which the writ is directed, is the proper court to deal with it. [WILDE, C. J. I very much doubt that. I had occasion to consider the *subject in the case of *Davies, dem., Lowndes, ten.*, 7 M. & G. 762, 8 Scott, N. [*256 R. 557.] It seems clear that the court of error has no jurisdiction :

(a) It is directed to the chief justice, as the party having the custody of the record, to be removed or to be transcribed.

and, in *Cane v. Masey*, 3 B. & C. 735, 5 D. & R. 624,(a) the Court of Queen's Bench quashed a writ of error on this ground. [WILDE, C. J. In *Tolson v. Kaye*, 6 M. & G. 536, 590, 7 Scott, N. R. 222, 268,(b) the court of error quashed the writ.] There, the court would give no judgment, the record being imperfect.(c) In *Snook v. Mattock*, 5 Ad. & E. 239, 6 N. & M. 783, on a feigned issue directed by the Court of King's Bench to try the existence of certain customs, the plaintiff had a verdict, subject to the opinion of the court on a special case, the question being, whether the customs, as stated in the declaration, had been sufficiently proved at the trial. The court having given judgment for the plaintiff, error was brought in the Exchequer Chamber, on the ground that the customs, as stated in the declaration, were not legal customs. The Court of Exchequer Chamber quashed the writ, on the ground that error did not lie on a feigned issue. But the Court of Queen's Bench afterwards expressed a doubt whether the court of error had power so to do. *257] [WILDE, C. J. In *King v. *Simmonds*, 14 Law Journ. N. S., Q. B. 248, 256, 7 Q. B. 289, TINDAL, C. J., delivering the judgment of the court of error, quashing the writ of error, says: "The principle appears to be, that the court is to quash the writ, as useless, when they find that the record sent up is not one which, by the commission contained in the writ of error, they have the power to examine: and this applies as much to the case where the record sent up is not a judgment which has been entered at all,—and such is the present case,—as it does where the record is one which varies in the name of the parties, or in other particulars. This principle was acted upon in *Tolson v. Kaye*, in which the writ of error was quashed, where there was no final judgment upon the whole record returned, and so nothing for the writ to operate upon: and in *Snook v. Mattock* there was a similar judgment, where it appeared that the judgment was one on which no writ of error would lie. It is true, that the Court of King's Bench has expressed a doubt as to the propriety of the decision in that case; but that was probably on the ground that on the face of the record it did not appear that the issue was feigned."]

If the court is of opinion that the application should be made to the court of error, the defendant will adopt that course.

Per curiam. We think, that, when, in obedience to the writ, a tran-

(a) And see the *Apothecaries Company v. Harrison*, 13 Ad. & E. 642, 4 P. & D. 292, in which it was held, that, where parties, on the trial of an action for several penalties, agree that a verdict shall be given for one only,—the defendant undertaking not to repeat the act complained of, and the plaintiff, that, unless he does so, execution shall not issue,—it is an implied term (nothing to the contrary being expressed) that the defendant shall not bring error: and, if he do so, the court (below) will quash the writ as issued against good faith.

(b) In *Roberts v. Tucker*, Style, 191, 219; *Dawkes v. Payton*, Ib. 218; *Shedlock v. La Pare*, Ib. 265; *Porter v. Swetnam*, Ib. 406; *Conye v. Lawes*, Ib. 472: writs of error were abated or quashed by the court in which they were returnable, *quia improvidè emanaverant*.

(c) The Court of Exchequer Chamber quashed the writ of error because they considered the record to be imperfect; and the final judgment which had been entered up, and which they held to be for that reason erroneous, was allowed to stand. 3 Man. Gr. & S. 740.

script of the record has been sent to the court of error, our jurisdiction is at an end, and that the application to quash the writ of error should not be made here. Rule on this point refused.(a)

*Nov. 13. *Unthank* now made a similar application to the court of error, upon affidavits stating substantially the same facts as those before detailed. [*258]

The court granted a rule nisi, but not without expressing a doubt whether the court of error was the proper court for the purpose.

The case was argued on the 30th of November, 1849, by *O'Malley* and *Willes* for the demandant, and by *Unthank* for the tenant. The court, without expressing any opinion upon the merits of the motion, desired that the matter might be re-argued upon the question of jurisdiction: and on the 2d of February, 1850, they called upon—

Unthank to support his rule.(b) Formerly, all original writs issued out of the court of Chancery: 4 Inst. 80; Com. Dig. *Chancery* (C. 1). The jurisdiction for this purpose was abolished by the statute 5 & 6 W. 4, c. 82, ss. 10, 12, by which the duties of the cursitors were transferred to the petty-bag office.(c) The practice of the petty-bag office is further regulated by the 12 & 13 Vict. c. 109, the 39th section of which enacts, “that, in every action, suit, and proceeding now pending, or which at any time hereafter shall be commenced or pending in the court of Chancery on the common-law side thereof, it shall be lawful for the superior courts of common law, and the judges thereof respectively, and they *are hereby respectively required, to hear and determine all such [*259] matters or applications arising in, or incident to, any such action, suit, or proceeding as aforesaid, as before the passing of this act might have been heard and determined by the Lord Chancellor and the Master of the Rolls, or either of them, and also to transact, do, and perform all such business, matters, and things, in, about, touching, or concerning any action, suit, or proceeding on the common law side of the said Court of Chancery, as by virtue of any orders or regulations for the time being in force by virtue of this act, may be transacted, done, or performed by such judge; subject, nevertheless, and according to the provisions of this act, and the laws, rules, and regulations for the time being in force for the regulation of the said court and the practice and proceedings thereof.” Giving this clause a reasonable construction, it must be held to refer to the court having seisin of the cause. If the Court of Common Pleas could entertain such a motion,—as it is submitted they might well have done,—*a fortiori* this court may. [PARKE, B. I believe this statute was not adverted to when the application was made to the court below.] It was not. With the exception of a case before the Master

(a) A rule nisi was granted to amend a mistake in the record; which rule was afterwards made absolute.

(b) Before PARKE, B., PATTESON, J., COLERIDGE, J., ROLFE, B., WIGHTMAN J., and PLATT, B.

(c) Which is, however, part and parcel of the Court of Chancery.

of the Rolls, which is not reported, and where his honour is said to have held that he had no jurisdiction, the only decision upon this statute occurred in *Baddeley v. Denton*, 19 Law Journ., N. S. Exch. 44, where ROLFE, B., held, that a writ of prohibition, issued out of the Court of Chancery, is a proceeding within the meaning of the 39th section, and that a motion to set aside such writ, may be made in either of the superior courts at Westminster. [WIGHTMAN, J. Is this court "a superior court of common law?" At common law, error from the Court of Common Pleas lay to the Queen's Bench. As a court of error sitting to *260] review a decision of the Court of *Common Pleas, we sit by virtue of the new jurisdiction created by Lord ABINGER's act for the amendment of the law, 11 G. 4 & 1 W. 4, c. 70, s. 8.] The Exchequer Chamber is a court of common law: none but common law questions can arise in it; and it is amongst the courts so classed in Com. Dig. *Courts* (D. 5). [PLATT, B. If you look at the 38d section,(a) it seems pretty evident that the statute, when speaking of the superior courts of common law, contemplates the Courts of Queen's Bench, Common Pleas, and Exchequer only.] That section contemplates only a particular description of proceedings. [PARKE, B. Would this have been a court under the statute of 7 Eliz. c. 9?] Possibly not. [PATTERSON, J. No doubt, the Court of Chancery had jurisdiction, before the passing of the act now in question, to quash a writ of error.] That is conceded. [PARKE, B. Why may not the Court of Common Pleas, which clearly is a "superior court of common law," exercise that jurisdiction since the statute?] It is at the least extremely doubtful whether that court has any such jurisdiction. The writ of error issues out of the petty-bag office, and is returnable here. It is not even addressed to the Court of Common Pleas, but to the lord chief justice, whose duty with respect to it is ministerial only. *261] [COLERIDGE, J. Would a single *member of this court have jurisdiction?] Yes, as a judge. [*Willes*. It has been decided that a judge, as a judge of the court of error, has no jurisdiction: it was so held in a case of *Higgs v. The St. Katharine's Dock Company*. PARKE, B. Could you have made this application before the passing of the 11 G. 4 & 1 W. 4, c. 70,—supposing the 12 & 13 Vict. c. 109, had passed?] The Court of Queen's Bench, as the then court of error, undoubtedly would have been a superior court of common law. This court may award a *venire de novo*, and may do many other things that are incident only to a superior court of common law. The section of the act treats of the proceedings by *scire facias*, which are transferred to the three courts of

(a) Which enacts, "that in case any issue or issues in law, or issues both in fact and in law, shall be joined in any action, suit, or proceeding on the common law side of the court of Chancery, then and in such case the record of such issue or issues shall be made up and filed in the office of the petty-bag, and a transcript of the said record shall or may thereupon be sent or taken into any one of the three courts of Queen's Bench, Common Pleas, or Exchequer; and such court shall, upon the transcript being brought into any such court, proceed to hear and determine the same in like manner as issues in law and fact from the common law side of the said Court of Chancery have heretofore been heard and determined in the Court of Queen's Bench."

Queen's Bench, Common Pleas, and Exchequer, by name: but, when it comes to the 39th section, the legislature uses general words—"the superior courts of common law at Westminster." It is worthy of remark, that the statute 5 G. 1, c. 13, which authorizes the amendment of variances or other defects in writs of error, gives the power to the court wherein the writ is made returnable. Independently of the statute, this court has jurisdiction, perhaps concurrently with the inferior court. The course ordinarily adopted by the courts below, where the writ of error has been brought against good faith, or in violation of an agreement entered into between the parties, has been, not to quash the writ of error, but to set aside the allowance of it (which is the act of the court below, (a)) or to permit the other party to issue execution notwithstanding the writ of error. Such were the cases of *Camden v. Edie*, 1 H. Blac. 21, *Best v. Gompertz*, 2 Dowl. P. C. 395, *Brown v. Lord Granville*, 2 Dowl. P. C. 796, *Wright v. *Nutt*, 1 T. R. 388, and *Holmes v. Newlands*, [262 2 Dowl. N. S. 716. In *Boreman v. Brown*, 1 Dowl. N. S. 281, the Court of Queen's Bench, on the authority of a case of *Jones v. De Lisle*, 3 Bingh. 125, 10 J. B. Moore, 617, in the Common Pleas, held that they had no power even to set aside the allowance of a writ of error. On the other hand there are three cases in which the courts below have taken upon themselves to quash writs of error which appeared to have been issued against good faith, viz. *Baddely v. Shafto*, 8 Taunt. 434, *Cave v. Masey*, 3 B. & C. 735, 5 D. & R. 624, and *The Apothecaries' Company v. Harrison*, 12 Ad. & E. 642, 4 P. & D. 292. But there, in all probability, the applications were made before the writ of error was returnable. [PARKE, B. I do not think you will find any satisfactory case, where the court of error has quashed the writ of error, on the ground that it has been issued against good faith. In the cases you cite, the same results would have occurred from permitting execution to issue notwithstanding the allowance of the writ of error. In *King v. Simmonds*, 7 Q. B. 289, 14 Law Journ., N. S., Q. B. 248, 256, the Exchequer Chamber quashed the writ of error for a defect of jurisdiction apparent on the face of the proceedings: and in *Thorpe v. Plowden*, 2 Exch. 387, the same court quashed a writ of error brought upon a judgment on a feigned issue under the 47th section of the tithe commutation act, 6 & 7 W. 4, c. 71. My brother PATTESON, in giving the judgment, says: "The legislature, intending to exclude a judgment of record in feigned issues under this act, has in effect excluded any writ of error. This being so, the case of *King v. Simmonds* is a direct authority to show that the proper *course is, for this court to quash the writ of error."] The juris- [263 diction in question must exist somewhere; otherwise, the undertaking contained in warrants of attorney and submissions to arbitration, not to bring error, is superfluous and idle. In *Davies, dem.*, *Lowndes, ten.*, 6 M. & G. 529, 7 Scott, N. R. 215, where a writ of right, by jour-

(a) *De facto* it is the act of the officer,—an act which he is bound to perform.

neys accounts, was brought after the death of a sole tenant, a motion having been unsuccessfully made to the Lord Chancellor to set aside the writ, on the ground, that, by the 3 & 4 W. 4, c. 27, s. 36, writs of right are wholly abolished, and that the original writ had abated by the death of the tenant,—application was made to the Court of Common Pleas (7 M. & G. 762, 8 Scott, N. R. 539, 2 D. & L. 272), to set aside the writ of *grand cape*, and subsequent proceedings; and that court only abstained from doing so because their decision would have finally determined the demandant's right, without any appeal. TINDAL, C. J., after stating that the objection might be raised by demurring to the count, observes,—"If this mode of deciding the question upon demurrer had not been open to the tenant, if he had not possessed the power of raising the question of whether the writ was valid or not before a superior court, except by previously incurring the expense of a new trial, we should have thought it our duty at once to have quashed the proceedings, and to declare the writ issued in this case by journeys accounts a nullity. But, as the tenant has the opportunity of bringing the question at once before the court upon the record, as a simple question of law, we think he can have no right to complain, if we decline to proceed summarily, and if we think it right to leave the question open for discussion before the highest tribunal." That shows, that, where the objection is *not* upon the record, the court in which the *writ of error is returnable will quash it.

*264] [PARKE, B. The court of error may *decline to proceed* upon the writ; but I doubt whether they can *quash* it except for some defect upon the face of it.] In *Lloyd v. Skutt*, 1 Dougl. 350, upon a motion in the Court of King's Bench to set aside a writ of error removing a judgment of that court in a *qui tam* action for usury, on the 12 Ann. stat. 2, c. 16, it was objected,—first, that the writ was bad in form, because it described the action as between two private parties, and not as a *qui tam* action, in which the King was interested,—secondly, in substance, on the ground that this sort of penal action is not within the meaning of the statute of 27 Eliz. c. 8, which first gave the writ of error from the King's Bench to the Exchequer Chamber. But Lord MANSFIELD said: "We have considered this case, and have talked with all the other judges upon it; and we are all of opinion that the writ of error cannot be quashed here, but that the application ought to be made either to the Court of Chancery, from whence it issues, or to the Exchequer Chamber, where it is returnable." In *Forster v. Laidler*, 6 D. & R. 174, the Court of Queen's Bench, upon the authority of that case, granted a rule to quash a writ of error from the borough court of Berwick-upon-Tweed. [PARKE, B. That was for a defect apparent on the face of the writ, there being only twelve days between the teste and return, instead of fifteen.] The court did not assume to proceed upon that narrow ground: there was no plea of *in nullo est erratum* in that case. [WIGHTMAN, J., referred to Snook v. Mattock, 5 Ad. & E. 239, 6 N. & M. 783,—cited *antè*, p. 256.] That

is like *King v. Simmonds* and *Thorpe v. Plowden*. [PARKE, B. I do not think we have any such general jurisdiction over writs of error, as is suggested. Our power, as it seems *to me, is confined to cases where there is a defect on the face of the writ, or where the record [*265 does not correspond with it: we cannot interfere on the ground of the proceeding being contrary to good faith. The only question is, whether the recent statute gives us jurisdiction.] If the court has no power to quash the writ, at any rate they have power to mould this rule so as to meet the justice of the case. [PARKE, B. (after consulting with the rest of the court). None of the authorities which have been cited suffice to convince us that we can interfere in this case. All they amount to is this, that the courts will exercise their power to prevent their own process from being used oppressively. The proper court in which to make this application, would be the Court of Chancery, unless its jurisdiction is taken away by the 12 & 13 Vict. c. 109, and transferred to the superior courts of common law at Westminster. The question is, what is meant by these words? The statute may mean to give a concurrent jurisdiction to all the three superior courts of law, or it may mean the court which has the proceedings before it; if the latter be the true construction of the act, probably this court may have power to deal with the matter. We wish to hear Mr. *Willes* on this point.]

Willes (with whom was *O'Malley*), *contra*. This court, though a superior court, and one which administers common law only, is not one of the "superior courts of common law" intended by the 12 & 13 Vict. c. 109. It is a court of a peculiar statutory creation. In *Vin. Abr. Court* (F), pl. 3, it is said, that "when a new court is erected, it is necessary that the authority and jurisdiction of the court should be declared; for, such new court can have no other jurisdiction than is expressed in the erection; for, a new court cannot prescribe: 4 Inst. 200, 213." This court, therefore, can *only exercise such powers as are necessary for the purpose of carrying into effect the object for [*266 which it was created. [WIGHTMAN, J. Before the recent statute, the Court of Chancery unquestionably might have set aside the writ: assuming the power of that court to be gone, where does it now reside?] In such one of the superior courts of common law as has possession of the record, or in a judge thereof. Throughout the act, down to s. 39, the courts of "Queen's Bench, Common Pleas, and Exchequer, and the judges thereof respectively," are mentioned *nominatim*: and when it comes to s. 39, the language is,—“it shall be lawful for *the superior courts of common law*, and the judges therefore respectively, and they are hereby respectively required, to hear and determine all such matters or applications arising in or incident to any such action, suit, or proceeding as aforesaid, as before the passing of this act might have been heard and determined by the Lord Chancellor and the Master of the Rolls, or either of them.” It is quite clear that the legislature did not in this clause mean to intro-

duce any other superior court of common law, than those which had previously been mentioned. There is not a word that has a tendency to show that it was intended to give jurisdiction to any *two* of those courts sitting together as a court of error. [COLERIDGE, J. The argument, then, does not seem to be very material; for, if you are right, any single judge(a) sitting at chambers might do what we are now asked to do. PARKE, B. You say the Court of Chancery has no jurisdiction?] For this purpose, none. [PARKE, B. The Master of the Rolls, and my brother ROLFE, seem both to have been of that opinion, in *Baddeley v. Denton*, 19 Law Journ., N. S., Exch. 44.] It is unnecessary *to *267] say whether that opinion is correct or not. [PLATT, B. It is worthy of remark, that s. 39, when speaking of the "superior courts of common law," uses no word of reference.] The court may read in "such," in order to give effect to the obvious meaning of the legislature,—as was done in the statute 3 & 4 W. 4, c. 98, s. 7, the act exempting bills of exchange and promissory notes of limited date, from the operation of the usury laws.(b) [PLATT, B., addressing himself to *Unthank*, observed that the word "thereof" threw a considerable degree of difficulty in his way, seeing that the judges composing that court could not be said to be "judges of the court of error." WIGHTMAN, J. These proceedings may go on in vacation. Whatever courts have jurisdiction over them, the judges of those courts respectively have the same power.] The 48th section of the 12 & 13 Vict. c. 109,—which is a re-enactment of the 11 & 12 Vict. c. 94, s. 48,—enacts "that every of Her Majesty's courts of common law, and all other courts, judges, officers, and others, shall take cognisance of all and every the writs and proceedings so brought before them as aforesaid, and give effect thereto, in such manner as may be requisite." If the statute is not held to be limited to the three superior courts, as above suggested, this clause might be contended to give jurisdiction to every inferior judge in the kingdom. The language of the 25th and 32d sections also confirms this interpretation of the 39th section.

PARKE, B. The only question now remaining for our decision, arises on the construction of the 12 & 13 Vict. c. 109; for, we have already sufficiently intimated our opinion, that, irrespectively of that statute, this *268] court has no jurisdiction to quash a writ of error, on the ground *of its having been issued in breach of good faith: its power in this respect is limited to cases where some defect is apparent on the face of the writ, or where the record brought up is inconsistent with it. The courts below seem, upon some occasions, to have assumed the power to quash the writ of error; but probably they ought to have done no more than vacate the allowance of the writ of error, or permit execution to issue notwithstanding such allowance. But, to quash the writ, on a

(a) *Quære*, of the Court of Common Pleas? See *The King v. Almon*, *Wilmot's Notes*, 243.

(b) *Vide Vallance v. Siddel*, 6 Ad. & E. 932, 2 N. & P. 78.

ground such as that disclosed here, it seems to us that the court of Chancery, from which the writ issued, was the proper jurisdiction.

The question, then, is, whether any jurisdiction is given to this court by the recent statute. That depends mainly upon the 39th section, which enacts, "that, in every action, suit, and proceeding now pending, or which at any time hereafter shall be commenced or pending in the said Court of Chancery, on the common law side thereof, it shall be lawful for *the superior courts of common law, and the judges thereof respectively*, and they are hereby respectively required, to hear and determine all such matters or applications arising in or incident to any such action, suit, or proceeding as aforesaid, as before the passing of this act might have been heard and determined by the Lord Chancellor and the Master of the Rolls, or either of them, and also to transact, do, and perform all such business, matters, and things, in, about, touching, or concerning any action, suit, or proceeding on the common law side of the said Court of Chancery, as by virtue of any orders or regulations for the time being in force by virtue of this act, (a) may be transacted, done, or performed by such judge; subject, *nevertheless, and according to the provisions of this act, and the laws, rules, and regulations for the time being in force for the regulation of the said court, and the practice and proceedings thereof." If the jurisdiction of the Court of Chancery is taken away by this act,—as the Master of the Rolls and Mr. Baron ROLFE seem to have thought,—the legislature must have intended to confer an equally facile and efficient jurisdiction elsewhere: and that affords a strong argument that the old jurisdiction of the Court of Chancery must have been intended to be transferred to those superior courts of common law, which, by themselves, or by the respective judges thereof, are accessible in vacation as well as in term time,—to the exclusion of the Exchequer Chamber.

We read the 39th section as if the word of reference "such" had been found therein, as in some of the earlier clauses, and as applying to the three superior courts before mentioned, viz. the Queen's Bench, Common Pleas, and Exchequer. We think Mr. Baron ROLFE was right in exercising the jurisdiction as he did in *Baddeley v. Denton*. We cannot think, however, that the legislature intended to limit it to the court in which the proceedings originate. If that were so, it would altogether exclude relief in many cases. It is evident, therefore, that the legislature intended to confer the new jurisdiction upon the superior courts of ordinary judicature.

The conclusion at which we have unanimously arrived, is, that the jurisdiction to quash the writ of error on the ground here presented to us, may be exercised by any one of the three superior courts of common law, but not by this court. If the argument urged by Mr. *Unthank* were to prevail, we might be called upon to set aside a writ of prohibition

(a) No rules or regulations have ever been framed under this act.

*270] issuing out of the petty-bag office, directed to a county court. *That seems to be an additional reason for holding that it is the Queen's Bench, Common Pleas, and Exchequer, and their respective judges, who are to exercise the powers which the Court of Chancery might formerly have exercised, and possibly may still, in dealing with matters of this sort.

The result is, that the defendant in this case must address his application to a judge at chambers, who will, no doubt, give him the relief which, upon the affidavits, we think he is entitled to.

Rule discharged, without costs.

An application was subsequently made to Mr. Baron PARKE at chambers, when his lordship made an order that the writ of error should be quashed.

An attempt was afterwards ineffectually made to get that order made a rule of the Court of Common Pleas, for the purpose of obtaining costs.

The matter was ultimately compromised.

*271] *KINNING v. BUCHANAN. June 25.

The judge of an inferior court of record who has made an order *simpliciter* for the payment of a debt by instalments, cannot, upon non-payment, issue his warrant for the imprisonment of the debtor, without giving him an opportunity of being heard as to the cause of such non-payment.

Where, therefore, in trespass by A. against B. for false imprisonment, B. pleaded that J. S. recovered a judgment against A., in the sheriff's court, London,—that A. was summoned, and appeared before the judge of that court, who ordered the sum recovered to be paid by instalments,—that the first instalment was demanded and not paid,—that the judge duly, by warrant under his hand and seal, according to 8 & 9 Vict. c. 127, ordered the officer of the court to take A., and convey him to prison for forty days,—and that B., as the attorney of J. S., delivered the warrant to the officer, who took A. Replication, that, by this order, it was not directed that A. should be committed, *modo et forma* :—

Held, that the warrant issued did not support the plea, which must be taken to aver the existence of a *legal* warrant.

Held also, that the defendant, having acknowledged actual participation in the act of trespass, by pleading in confession and avoidance, could not protect himself, *upon this issue*, by showing that he had acted merely as the attorney of J. S.

TRESPASS. The declaration stated, that the defendant, on the 27th of April, 1847, with force and arms, assaulted the plaintiff, and then seized, &c., and also then imprisoned the plaintiff, and kept and detained him in prison for a long time, to wit, thirty-nine days then following, contrary to law; and that thereby the plaintiff not only suffered great anguish and pain of mind, and was prevented from attending to his lawful affairs, but was also thereby then greatly exposed and injured in his credit, reputation, and circumstances, and was necessarily subjected and put to divers expenses, amounting, to wit, to 40*l.*, in and about

endeavouring to obtain, and in obtaining, his liberation from the said imprisonment, &c.

The defendant pleaded,—first, not guilty; whereupon issue was joined.

Secondly, that, before the said time when, &c., to wit, on the 5th of October, 1846, William Townley levied his certain plaint against the now plaintiff, in the *court of our lady the Queen, before Thomas Challis, Esq., then being one of the sheriffs of the city of London, [*272 in his compter, situate in the parish of St. Giles-without-Cripplegate, in the ward of Cripplegate-without, in the same city, and within the jurisdiction of the same court, according to the custom of the said city, for a cause of action personal arising within the jurisdiction of the said court; that such proceedings were thereupon had, that, afterwards, to wit, on the 5th of December, 1846, at the said court then held before the said sheriff, at the Guildhall of the said city of London, and within the said city, and within the jurisdiction of the said court, the said William Townley, by the consideration and judgment of the said court, recovered against the now plaintiff, as well a certain debt of 19*l.* 19*s.*, as also 3*l.* 12*s.* 6*d.* for his costs of suit, as by the record and proceedings thereof, still remaining in the said court, appears; that afterwards, and after the passing of an act of parliament passed in the ninth year of the reign of our lady the now Queen, intituled ‘An act for the better securing the payment of small debts,’ and before the said time when, &c., to wit, on the 5th of December, in the year last aforesaid, the (now) plaintiff then being indebted to the said William Townley in a sum not exceeding 20*l.*, besides costs of suit, by force of the said judgment, to wit, the sum of 19*l.* 19*s.*, the said William Townley made application, by petition and note in writing according to the form in schedule B. to the said act of parliament annexed, to the said court,—the same being an inferior court of record for the recovery of debts in and for the city of London, and then being held at the Guildhall aforesaid, in the said city, and within the jurisdiction of the said court, and the plaintiff then residing within the jurisdiction of the said court, to wit, within the city of London, and the said court then having a judge who was a barrister-at-law, that is to say, EDWARD BULLOCK, Esquire, *barrister-at-law, then being the judge of the said court,—by which [*273 petition and note in writing the said William Townley requested the said court to summon the plaintiff to answer touching the debt due to the said William Townley by the judgment of the said court on his the said William Townley’s behalf; that thereupon the said court, afterwards, to wit, on the 7th of December, 1846, upon the said application of the said William Townley, granted to the said William Townley a summons according to the form in schedule A. unto the said act of parliament annexed, by which summons the (now) plaintiff was required to appear at the sheriff’s court, London,—being the said court,—to be

holden at the Guildhall, of the city of London, in the said city, on Saturday, the 12th of December, 1846, at a quarter to ten of the clock in the forenoon of the same day, precisely, to answer such questions as might be put to him touching the not having paid to the said William Townley the sum of 23*l.* 11*s.* 6*d.*, being the amount of the said debt and costs recovered by the said judgment; that the said William Townley then obtained the said summons from the said court; that the (now) plaintiff was, afterwards, and before the return of the said summons, to wit, on the said 7th of December, in the year last aforesaid, and within the jurisdiction of the said Court, to wit, at London, duly served with the said summons, and summoned thereby; that thereupon, afterwards, and before the said time when, &c., to wit, on the 12th of December, in the year aforesaid, at the time and place appointed by the said summons,—such place being within the jurisdiction of the said court,—the (now) plaintiff appeared before the said court, the same court being then and there holden before the said EDWARD BULLOCK, then being the judge of the said court, and a barrister-at-law as aforesaid, in obedience to the said summons; that the said *William Townley also then and there appeared *274] before the said court so holden as aforesaid; that the (now) plaintiff was then and there duly examined by and before the said court, so holden as aforesaid, as required by the statute in such case made; and the said court so holden as aforesaid, upon hearing the (now) plaintiff and the said William Townley, and it appearing to the said court that the (now) plaintiff had the means of paying the said debt and costs by the instalments hereinafter mentioned, did, in pursuance of the statute in such case made, order that the (now) plaintiff should pay the said debt and costs to the said William Townley, in manner following, that is to say, the sum of 2*l.*, part thereof, on the 12th of January then next, and the residue thereof by instalments of 2*l.* on the 12th of every subsequent month, until the debt and costs aforesaid should be fully paid,—of which order the (now) plaintiff then and there had notice, and was then and there duly served with a copy thereof, and the original order was at the same time shown to him; that the (now) plaintiff did not pay the said instalments at such times as the said court ordered, but afterwards, and before the said time when, &c., to wit, on the 12th of January, 1847, the (now) plaintiff made default in the payment of the said instalment of 2*l.* which then became due and payable, although payment of the same was then demanded of him; that, afterwards, and before the said time when, &c., to wit, on the 4th of February, 1847, the said instalment then remaining wholly in arrear and unpaid, it was duly made to appear, and was proved, and did then and there duly appear, to the said court, so being holden as last aforesaid, that the plaintiff had had notice of the said order, and that he had been served with a copy thereof, and the original shown to him, and that he had not paid the said instalment, and that the same had been duly demanded of him, and was

*in arrear and unpaid; that thereupon, the said court, so holden as aforesaid, before the said EDWARD BULLOCK, so being such judge of the said court, and such barrister-at-law as aforesaid, before the said time when, &c., to wit, on the day and year last aforesaid, at London aforesaid, and within the jurisdiction of the said court, duly, and according to the form of the statute, ordered that the plaintiff should be committed for forty days to Her Majesty's debtors' prison for London and Middlesex, in the city of London, being the common gaol wherein debtors under judgment and in execution of the superior courts of justice, might be, and were usually, confined within the city of London, being the city in which the plaintiff was then resident; that thereupon, the said EDWARD BULLOCK, so being, and as, such judge of the said court, and barrister-at-law, at the request of the defendant, then being the attorney of and for the said William Townley, and as such attorney, and acting upon the retainer and at the request of the said William Townley, duly, and according to the form of the statute in such case made, then and there made his warrant in writing under his hand and seal, directed to Lloyd Simpson, one of the serjeants-at-mace of the said court, and to Thomas Burdon, keeper of the said debtors' prison, or his deputy there, whereby, after reciting that the (now) plaintiff, therein described as Thomas Kinning, of, &c., on the 7th of December then last, being indebted to the said William Townley, of, &c., in a sum not exceeding 20*l.*, besides costs of suit, that is to say, in the sum of 19*l.* 19*s.*, besides 3*l.* 12*s.* 6*d.* costs of suit, by force of the judgment thereafter mentioned, and then being at Fleet Lane, in the city aforesaid, and within the jurisdiction of the said court, had been duly summoned to appear on the 12th of December last at the said court, to answer such questions as might be put to him touching the not having paid to the said William *Townley the sum of money recovered in a certain judgment of the said court, on the 5th of December, 1846 (meaning the afore- [*276 said judgment), and the (now) plaintiff having appeared before the said judge at the time and place therein mentioned, and it thereupon then and there appearing to the said judge, by the admission of the (now) plaintiff, that the (now) plaintiff had the means of paying the said debt and costs aforesaid in manner thereafter mentioned, the said judge did then and there order that the (now) plaintiff should pay the said debt and costs aforesaid to the said William Townley, in manner following, that is to say, the sum of 2*l.* on the 12th of January then next, and the residue thereof by instalments of 2*l.* on the 12th of every succeeding month, until the said debt and costs were fully paid, and that it had, on the day of making the said warrant, at the said court, been duly proved before the said judge that the plaintiff had not paid 2*l.*, the amount of the first instalment, as directed by the said order, although the time for payment thereof had elapsed, and the same had been duly demanded of the (now) plaintiff, and the (now) plaintiff had been personally served with a

copy of the said order, and the said original order was at the same time shown to him, but that 2*l.*, being the amount of the said first instalment, was still due and owing and unpaid to the said William Townley, contrary to the tenor and effect of the said order,—the said judge, therefore, by the said warrant, willed, required, and authorized the said Lloyd Simpson, immediately upon the receipt of the said warrant, or as soon after as might be, to take into his custody the body of the (now) plaintiff, and him safely to convey to Her Majesty's debtors' prison for London and Middlesex, in the city of London, being the common gaol wherein the debtors under judgment and in execution of superior courts of justice might be confined within the city of London, being the city in which the *277] (now) *plaintiff, had been resident, and there to deliver him to the said keeper of the said prison, who was thereby required and authorized to receive the (now) plaintiff into his custody, and him safely to keep and detain in the said prison, for the space of forty days from the time of his arrest under the said warrant, or until he should be discharged out of custody by leave of the said judge, and that, for so doing, the said warrant should be their sufficient warrant,—as by the said warrant appears; that the defendant so being, and as, such attorney, and on the retainer and at the request of the said William Townley, then delivered the said warrant to the said Lloyd Simpson, who then, and from thence until and at and after the said time when, &c., was one of the serjeants-at-mace of the said court, to be executed in due form of law, and then requested him to execute the said warrant in due form of law; and that, by virtue of the said warrant, and at the request of the defendant, so being such attorney, and acting on the said retainer, and at the said request of the said William Townley, the said Lloyd Simpson, so being and as such serjeant-at-mace, at the said time when, &c., at London aforesaid, and within the jurisdiction of the said court, took and arrested the (now) plaintiff by his body, and forthwith conveyed him to the said debtors' prison for London and Middlesex, and delivered him to the said keeper of the said prison, and the (now) plaintiff was detained in the said prison under and by virtue of the said warrant, for the space of thirty-nine days in the said declaration mentioned, the said sum of 2*l.*, during all that time, and still, being wholly unpaid and unsatisfied, and on the occasion and for the purpose aforesaid the plaintiff was necessarily and unavoidably a little seized and laid hold of, and pulled and dragged about, which were the same supposed trespasses in the declaration mentioned; verification.

*278] *The plaintiff joined issue on the first plea, and replied to the second, that the said EDWARD BULLOCK did not order that the (now) plaintiff should be committed for forty days to her Majesty's debtors' prison for London and Middlesex, in the city of London, in manner and form as in the second plea alleged,—whereupon issue was joined.

The cause was tried before COLTMAN, J., at the sittings at Westminster, after Hilary term, 1848.

It was proved that Townley had recovered a judgment against the present plaintiff, in the sheriff's court, London, for 19*l.* 19*s.* and costs, and that the present defendant, as Townley's attorney, instituted the proceedings against the plaintiff upon that judgment, under the 8 & 9 Vict. c. 127.

In support of the second issue, the defendant put in a warrant of commitment signed by the judge of the sheriff's court, in the terms recited in the second plea.

For the plaintiff, it was insisted that this warrant was bad upon the face of it, for the reasons given by this court in the case of *Ex parte Kinning*, 4 Man. Gr. & S. 507, and therefore that the plea was bad, for not alleging a good warrant of commitment; or that, if the plea was to be understood as alleging that the judge of the inferior court had made a valid order, it was not proved, and therefore the plaintiff was entitled to a verdict on the second issue.

On the part of the defendant, it was insisted that the issue taken on the second plea only made it necessary for him to show, that, in point of fact, such an order was made as that described in the plea.

The learned judge having directed a verdict for the plaintiff on the first issue, and for the defendant on the second,

**Pashley*, in Easter term, 1848, obtained a rule nisi for a new trial on the ground of misdirection, or for judgment *non obstante veredicto* on the second issue. [*279]

Byles, Serjt., and *Peacock*, in Easter term last, showed cause. A second summons was not necessary before an order for the imprisonment of the debtor for non-payment of the debt pursuant to the first order; and, if necessary, the second plea sufficiently shows that a second summons *did* issue: and, further, assuming a second summons to have been necessary, and *not* to have issued, the order in question being a proceeding of a court of competent jurisdiction, acting *inverso ordine*, the party promoting it is protected.

1. The court can hardly be expected to deviate from the decision they unanimously came to in *Ex parte Kinning*, upon the same warrant of commitment: but it may be proper to call their attention to some statutory provisions which were not, upon that occasion, adverted to. The 1st section of the 8 & 9 Vict. c. 127, provides, that the debtor shall be examined touching the manner and time of contracting the debt, the means or prospect of payment he then had, *the property, or means of payment, he still hath or may have*, and the disposal he may have made of any property since contracting the debt; and it authorizes the court, or commissioner, to make an order on the debtor for payment of the debt by instalments, or otherwise: "and, "in case such debtor shall not attend as required by the said summons, and shall not allege a sufficient

excuse for not attending, or shall, if attending, refuse to disclose his property, or his transactions respecting the same, or respecting the contracting of the debt, or shall not make answer thereof to the satisfaction of *280] the commissioner or court, *or shall appear to such commissioner or court to have been guilty of fraud in contracting the debt, or of having wilfully contracted it without reasonable prospect of being able to pay it, or of having concealed or made away with his property in order to defeat his creditors, or *if he appears to have the means of paying the same by instalments, or otherwise, and shall not pay the same at such times as the commissioner or court shall order, or as the court shall have ordered in which the original judgment shall have been obtained, or order made*,—then in any of the said cases, it shall be lawful for such commissioner, or the judge of such court to order such debtor to be committed for any time not exceeding forty days," &c. The 23d section enacts "that all the enactments of the 7 & 8 Vict. c. 96, and of the several acts under which the said several courts [for the recovery of small debts] are now held or constituted, shall within their several districts be deemed to apply to every proceeding under this act, so far as the same are applicable, and not repugnant to the provisions of this act." Now, by the 62d section of the statute so incorporated in that at present under consideration, it is enacted, "that, if it shall at any time appear, to the satisfaction of the judge of any such court, by the oath or affirmation of any person, or otherwise, that any defendant is unable, from sickness or unavoidable accident, to pay and discharge the debt or damages recovered against him, or any instalment thereof ordered to be paid as aforesaid, it shall be lawful for the judge in his discretion, to suspend or stay any judgment, order, or execution given, made, or issued in such action, for such time as the judge shall think fit, and so from time to time, until it shall appear, by the like proof as aforesaid, that such temporary cause of disability has ceased." Reading these clauses together, it would seem,—*281] the judge having already upon the first occasion inquired *into the debtor's means of payment,—that the application for indulgence should come from the debtor himself. [CRESSWELL, J. The terms of the section last cited seem to import that an execution has already issued.]

2. The next question is, whether enough does not appear on the face of the second plea, to show that a second summons *did* in fact issue. In *Adams v. Freeman*, Sayer, 81, 2 Wils. 5, it is said by LEE, C. J., that "It was heretofore necessary for the plaintiff in an action in the inferior court, who would justify an imprisonment under a *capias* awarded by that court, to set out in his plea of justification all the proceedings anterior to the awarding of the *capias*: but it was never necessary for the officer by whom the arrest was made, to do this. It has, however, for some years past been holden sufficient for the plaintiff in the action in the inferior court, to allege in such plea that a plaint was levied and

process prayed in the inferior court, and that *superinde taliter processum fuit*, that a *capias* was awarded, without setting out all the proceedings between the levying of the plaint and the awarding of the *capias*." And in *Titley v. Foxall*, Willes, 688, WILLES, C. J., says: "We held, in *Moravia v. Sloper*, Com. Rep. 574, Willes, 80, that *taliter processum est* would be sufficient, if it did not appear (as it did in that case) that there could not have been a precedent summons; and we founded our opinion on the case of *Patrick v. Johnson*, 3 Levins, 408, and on several other cases there cited. It was said, in that case, that it was resolved by the whole court, that *taliter processum est* was sufficient, though it had been formerly held otherwise, and that it had been so resolved by HALE, C. J., and the court of B. R., H. *24 & 25 Car. 2." *Adams v. Freeman*, Sayer, 81, 2 Wils. 5, is to the same effect. [WILDE, C. J., [*282 If the issuing of a second summons is necessary, and is stated, and not proved, how does that affect the question whether or not there should be a new trial? CRESSWELL, J. If stated, and not traversed, it is admitted.]

8. Then, this being a proceeding of a court of competent jurisdiction, the party (and *a fortiori* the attorney, who merely does his duty) is protected. In *The Case of the Marshalsea*, 10 Co. Rep. 76 a, 2d resolution, it was resolved, that, where a court has jurisdiction of the cause, and proceeds *inverso ordine*, or erroneously, no action lies against the party who sues, or the officer or minister of the court who executes the precept or process of the court; but, when the court has not jurisdiction of the cause, the whole proceeding is *coram non iudice*, and actions will lie against them, without any regard of the precept or process. *Gwinne v. Poole*, 2 Lutw. 935, is to the same effect. In *Webb v. Batchelour*, 1 Vent. 273, in trespass for taking cows, upon not guilty, a special verdict was found, that an act for repairing the highways appointed that such persons as keep carts and horses, &c., should send them at certain times to assist in the repairing of the ways, not having a reasonable excuse, and that warning was given to the parishioners of the parish whereof the plaintiff was parson, to send in their carts, and that, the plaintiff omitting to do it, a justice of peace made a warrant to the defendant to distrain him, according to the authority given by the act, &c. On the part of the plaintiff, it was contended "that the justice of the peace ought to have caused the plaintiff to appear before him, to have seen whether he had an excuse, before he could have made his warrant; and [*283 that, though the officer that executes the process of a court of record be indemnified where the proceeding is erroneous, yet 'tis not so where the proceeding is not of record, as 10 Co., in the case of the Marshalsea; *Nichols v. Walker*, Cro. Car. 894, where a warrant was made by a justice of the peace, to distrain for a poor-rate; trespass was maintained against the officer that executed the warrant, because the plaintiff was not chargeable as an inhabitant of the parish for whose poor the rate was

made." But the court said: "the officer that executes the warrant (though unduly made, for the cause alleged), is not answerable; for he is not to judge, but to execute the matter, it being within the jurisdiction of the justice of the peace: and 'tis not like the case in 3 Cro. 394; for, there, the churchwardens and overseers of one parish distrained in another parish, which was out of the limits of their authority." In *Painter v. The Liverpool Oil-Gas Company*, 3 Ad. & E. 433, 6 N. & M. 736, by a statute establishing a gas-light company, it was enacted, that, if any person should refuse or neglect, for ten days after demand, to pay any rent due from him to the company for the supply of gas, such rent should be recovered by the company, or their clerk, by warrant of any justice of peace for the town, &c., and it should be lawful for the company, or their clerk, or any person acting under their authority, with such warrant, to levy the sum so due, by distress and sale of the goods of the party so neglecting or refusing to pay, &c. It was held, that a warrant so issued by a justice, without previously summoning and hearing the party to be distrained upon, was illegal, though a summons and

*284] hearing were not in terms required by the act; and *that such warrant afforded no justification *to the company*, in trover for seizing the plaintiff's goods under it, although *it would have protected the clerk or officer*. "A warrant," says Lord DENMAN, "is a justification to officers, because they are not to canvass the legality of the process they have to execute. Acts of parliament have been passed for their protection, founded on that principle; and it is a just one; for, it would be absurd that an officer charged with the execution of a warrant, should have to pause and consider whether it was regularly issued or not. But here, the parties relying on the warrant are not officers; it is not even the clerk of the company who justifies, but the company themselves, who allege that their clerk, acting under their authority, and by their command, took the goods by virtue of the warrant. The case, therefore, is like those where the question has been, not whether an officer was justified, but the parties who set him in motion. The decision in *Webb v. Batchelour* limits itself to the principle that an officer is not liable for executing an irregular warrant; a doctrine also laid down by POWELL, B., in *Gwinne v. Poole*. Those cases would have resembled the present, if the defendants had been parties intervening between the magistrate and the officer, and justifying themselves for employing the officer to act under the warrant." Here, the defendant, as attorney, had a duty to perform towards the party who employed him. Notwithstanding the strictures upon it in *Green v. Elgie*, 5 Q. B. 99, 1 Dav. & Meriv. 199, the case of *Sedley v. Sutherland*, 3 Esp. N. P. C. 202, is a distinct authority to show that the attorney is entitled to the protection of the court, where he has not exceeded his duty. In *Cooper v. Harding*, 7 Q. B. 928, it

*285] was held, that, if attorneys *conducting the business of a *fiat* in bankruptcy, take out a summons to attend before a commissioner

under the 6 G. 4, c. 16, s. 33, which is disobeyed, and they afterwards obtain a warrant of the commissioner to arrest and bring before him for examination the party so summoned, and the warrant proves invalid, the attorneys are not liable in trespass, if they have taken no steps in the execution of the warrant, except ordering it to be prepared by an agent, who when it was ready, gave the messenger notice to take it: and this although the attorneys, in applying for the warrant, used urgency, and, being told by the commissioner that they must take it at their peril, said they would do so. All that the defendant in this case did, was in accordance with what was done in *Cooper v. Harding*. In *Barker v. Braham*, 3 Wills. 368, 2 Sir W. Blac. 866,—which will probably be relied on for the plaintiff,—the attorney was held liable, because he *personally* delivered the *ca. sa.* to the bailiff, with instructions to execute it immediately. [V. WILLIAMS, J. Your special plea admits that the defendant here took an active part in the trespass, and seeks to justify it. CRESSWELL, J. If the defendant did not order the plaintiff to be taken, it is an answer under not guilty: if he did, then he by his second plea justifies under a valid order. He must, therefore, to make out his justification, show that the judge had power to make the order which he did make.] At most, that only makes the second plea an informal plea of not guilty. [CRESSWELL, J. You can hardly rely on this as a special plea of not guilty.] The plea shows that what was done was *prima facie* lawful. [CRESSWELL, J. You admit that *you* ordered the plaintiff to be taken, and you show that which does not amount to a valid order. WILDE, C. J. The question is, whether the delivery of the warrant *to the serjeant-at-mace amounted to an order to arrest the plaintiff, so as to make the attorney who did it liable to an action. [*286 It must be remembered that the warrant has been thought a valid one by two very learned judges.(a) But it is pleaded in bar to the whole action,—by way of confession and avoidance.] In *Lowe v. Tutte*, Willes, 14, to trespass, assault, and false imprisonment, the three defendants pleaded a joint plea of justification under process, in which one of them said that he, as attorney for the party suing out the process, delivered the warrant to the other two defendants (to whom it was directed) to be executed in due form of law; and the two others, that they executed it; and it was held a good plea.

Pashley and *Henniker*, in support of the rule, submitted,—that there is a distinction between process of superior and inferior courts; in the former, *omnia presumuntur rite esse acta*; in the latter, the rule *de non apparentibus et non existentibus eadem est ratio*, applies. This principle is distinctly laid down in the judgment in *Gossett v. Howard*, 10 Q. B. 411, 454: “Many of the writs issued by superior courts do, upon the face of them, recite the cause of their issuing, and show their legality; writs of execution, for instance: others, however, do not, and, though

(a) PATTERSON, J., and EARLE, J., Vide *Kinning*, Ex parte, 16 Law Journ., N. S., Q. B. 257.

unquestionably valid, are framed in a form which, if they had proceeded from magistrates, or persons having a special jurisdiction unknown to the common law, would have been clearly insufficient, and rendered them altogether void." Nothing is to be presumed, in the proceedings of inferior courts: *Peacock v. Bell*, 1 Wms. Saund. 73. It is impossible to establish any distinction between the sheriff's court in this case, and *287] courts of quarter sessions. In *both, jurisdiction must appear on the face of the order. In *Dempster v. Purnell*, 3 M. & G. 375, 4 Scott, N. R. 30, TINDAL, C. J., in giving judgment, says: (a) "I take the rule to be well established by the cases of *Moravia v. Sloper*, Willes, 30, and *Titley v. Foxall*, Willes, 688, that, where it appears upon the face of the proceedings that the inferior court has jurisdiction, every intendment will be made to support them: but, if it do not so appear, or, if the point whether or not the court has jurisdiction be left in doubt, no such intendment will be made." Here the want of jurisdiction over the proceedings is the same as the want of jurisdiction over a cause in an inferior court. The *King v. Halcott*, 6 T. R. 583, first established the principle, that, where an order is in the nature of an execution, it must set out the proceedings in the same manner as a conviction: and that case has been recognised in many subsequent decisions,—*The King v. Marquess of Downshire*, 4 Ad. & E. 698, 721, 6 N. & M. 92; *Day v. King*, 5 Ad. & E. 359, 6 N. & M. 845; *The Queen v. Toke*, 8 Ad. & E. 227, 3 N. & P. 323. [V. WILLIAMS, J. If a statute requires a summons, then an order must set it out, in the same manner as a conviction: but, if the summons be necessary by the common law, it is not requisite to set it out in the order. CRESSWELL, J. It may be, that, up to the point of showing jurisdiction, an order must be as specific as a conviction. That distinction may reconcile many of the cases.] In orders made under the 4 G. 4, c. 34, relating to masters and servants, it has been held that all the evidence taken before the magistrates must be set out: *In re Gray*, 1 New Sessions Cases, 854; *The Queen v. Tordoft*, 5 Q. B. 933, 1 Dav. & Meriv. 693. The words of that statute are almost identical with those of the 8 & 9 Vict. c. 127.

*It is submitted that the warrant set out in the second plea was *288] bad upon the face of it, and that its validity was well put in issue by the replication.

The following cases were also cited:—*Dresser v. Stansfield*, 14 M. & W. 822; *Gisborne v. Hart*, 5 M. & W. 50; *Williams v. Germaine*, 7 B. & C. 468, 1 M. & R. 394, 403; *Dudlow v. Watchorn*, 16 East, 89; *Sandon v. Proctor*, 7 B. & C. 800; *Everard v. Paterson*, 6 Taunt. 625, (645), 2 Marsh. 304; *Lucas v. Nochells*, 10 Bingh. 157, 3 M. & Scott, 627; *Ransford v. Copeland*, 6 Ad. & E. 482, 1 N. & P. 671, W. W. & D. 268; *The King v. Venables*, 1 Stra. 630; *The King v. Hawkins*, Cases of Settlement and Removal, 96; *The King v. Cleg*, 1 Stra. 475;

(a) 3 M. & G. 335.

The Queen v. Rose, 3 D. & L. 359, 1 Wms. Saund. 298, n. (1); *Startup v. Macdonald*, 2 M. & G. 395, 2 Scott, N. R. 485; S. C. in error 6 M. & G. 593, 7 Scott, N. R. 269; *Clement v. Lewis*, 7 J. B. Moore, 200, 3 B. & B. 297; *Newton v. Harland*, 1 M. & G. 644, 1 Scott, N. R. 474, 502, 3; *Codrington v. Lloyd*, 8 Ad. & E. 449, 1 P. & D. 157; *Kinning, ex parte*, 16 Law Journ., N. S., Q. B. 257. *Cur. adv. vult.*

WILDE, C. J., now delivered the judgment of the court: (a)

This was an action of trespass for false imprisonment. The defendant pleaded,—first not guilty, and an issue was joined thereon which the jury found for the plaintiff, on evidence which confessedly justified the verdict.

The defendant also pleaded a special plea stating a judgment recovered against the plaintiff by one William *Townley, in an inferior court of record, viz. the sheriffs' court of the city of London, for a debt [*289 under 20*l.*, and a subsequent application, under the statute 8 & 9 Vict. c. 127, to that court, for a summons against the now plaintiff, to answer touching the debt due by the judgment. The plea then alleged, that the court granted the summons, requiring the appearance of the now plaintiff at the court, that the summons was duly served, and that the now plaintiff accordingly appeared, and was examined before the judge of the court, who thereupon made an order that the now plaintiff should pay the debt and costs by certain specified instalments. The plea then averred, that the now plaintiff made default in the payment of the first instalment (although payment of it was demanded of him), and that afterwards it was duly made to appear, and was proved, and did duly appear to the said court, that the now plaintiff had been duly served with the order, and had not paid his instalment, though demanded; whereupon the said judge duly, and according to the form of the said statute, ordered that the plaintiff should be committed for forty days to the debtors' prison for London and Middlesex; and thereupon the judge of the court, at the request of the defendant, then being the attorney of the plaintiff, Townley, and as such attorney, and acting upon his retainer and at his request, duly, and according to the form of the statute, made his warrant, directed to the serjeant-at-mace and the keeper of the said prison, by which,—after reciting the judgment, and the order for payment of the amount by instalments, and the default in payment thereof, &c., &c.,—the judge required the serjeant-at-mace to take the body of the now plaintiff, and convey him to the said prison, and there to deliver him to the keeper, and required the keeper to receive the now plaintiff, and keep him in prison for forty days, or until, &c.; and that the now defendant, so being the *attorney, and on the retainer, and at the request of the said [*290 William Townley, delivered the warrant to the serjeant-at-mace, and requested him to execute it in due form of law; and that, by virtue of such warrant, and at the said request of the defendant, the serjeant-

(a) WILDE, C. J., COLTMAN, J., CRESSWELL, J., and V. WILLIAMS, J.

at-mace took and arrested the now plaintiff, and conveyed him to the prison, and delivered him to the keeper; and that he was detained in prison under the warrant, &c.; which were the same supposed trespasses, &c.

To this plea, the plaintiff replied, that the said judge did not order that the said plaintiff should be committed, *modo et formâ*, concluding to the country.

On the trial, the defendant, in order to sustain this issue, produced an order of commitment made by the judge in the sheriffs' court, which corresponded with that described in the special plea, but which contained no statement of any previous summons of the plaintiff to show cause why he should not be committed. And the jury, under the direction of the learned judge, found, on the evidence, for the defendant.

A rule was afterwards obtained, on behalf of the plaintiff, to show cause why there should not be a new trial, for a misdirection, or judgment for him *non obstante veredicto*. The ground of the rule was, that the order was bad, for want of such previous summons, and that either the plea, in order to make it a good plea, must be understood to allege that the judge made a valid order,—in which case, the judge ought to have directed the jury to find for the plaintiff,—or the plea was no good bar, for want of an allegation of such previous summons,—in which case, the plaintiff was entitled to judgment *non obstante veredicto*.

On showing cause, it was contended, on behalf of the defendant, that the traverse did not put in issue the validity of the order, but only the question whether in fact an order was made as described in the plea, and

*[291] therefore the verdict was rightly found for the defendant; and, further, that it was not essential to the plea that the order should be valid, inasmuch as the defendant appeared to have merely done his duty as the attorney of one of the litigant parties, in the execution of the order of a judge of competent jurisdiction; and that an attorney so acting is protected, whether the order be valid or not. It is also contended that the order was good on the face of it; for, that it was not necessary that the issuing of a summons should be stated.

But we are of opinion that these arguments are not well founded. It is true, that, if an attorney does no more than set a court of competent jurisdiction in motion on behalf of his client, he is no trespasser, notwithstanding that such court should, on his motion, do an act of trespass by its officers: and that he would, therefore, be entitled to a verdict on the plea of not guilty, if an action were brought against him in respect of such an act of trespass. But, where, by a special plea like the one in question, he admits, and undertakes to justify, his concurrence in it, we are of opinion that he can only make out his justification by showing a legal authority under which he acted; and, consequently, that it is essential to the defence in the present case, that the order relied upon should be a valid order. Accordingly, we think that the plea, when it avers

that the judge of the sheriffs' court "duly and according to the form of the statute, ordered that the plaintiff should be committed for forty days," &c., must be understood to aver that the judge made a valid order to that effect; and that the replication, by denying that he did order that the plaintiff should be committed, in manner and form, &c., raised an issue which the defendant could not support without proving a valid order: for, if this issue were to be found for him, it would be inferred, *after verdict, that the judge, at the trial, had construed the plea in the sense requisite for its validity, and that, consequently, [*292 such an order had been proved: otherwise, the jury would not have found for the defendant.(a)

But, in fact, the order produced at the trial was in the very terms of the warrant which this court has already decided,—on the occasion of the plaintiff's applying for his discharge under a writ of *habeas corpus*,—to be invalid on the face of it, on the same ground of objection as that taken in the present case against the validity of the order on which the warrant was founded. And it appears to us, that, on the principle of that decision, we must consider the order to be invalid, and that, therefore, the defendant failed to maintain the issue, and the judge ought to have directed the jury to find for the plaintiff.

For these reasons, we think that the rule must be made absolute for a new trial. Rule absolute accordingly.

(a) But the statement of facts which precedes the allegation that the judge *duly* ordered the committal, would, according to the decision of this court in *Ex parte Kinning*, 4 Man. Gr. & S. 507, appear to preclude the possibility of the existence of a *valid* order of imprisonment.

*HOPWOOD v. THORN. June 25.

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A declaration for slander and libel stated, by way of inducement, that the plaintiff was minister of a dissenting congregation at T., deriving emoluments from his said calling; that he had formerly been a draper at S., in partnership with H. P., his brother-in-law; that the partnership had been dissolved, and that there were certain accounts and money transactions between the plaintiff and H. P. in relation thereto; that false and scandalous reports concerning the plaintiff and the said partnership accounts and transactions had been circulated among the congregation at T., and it was proposed that one E. H. should examine into the said accounts and transactions, on the part of the plaintiff; and that a correspondence and discussion afterwards took place between the defendant and one R. A., relating to those accounts and transactions: the first count then proceeded to allege that the defendant, intending to injure the plaintiff in his office and character of minister of the congregation at T., and to cause him to be deprived of that office, &c., in a discourse of and concerning the plaintiff, and of and concerning him in his said calling and ministry, and of and concerning the said partnership, and the said accounts and money transactions with H. P., spoke these words,—with proper innuendoes,—“I do not go by reports: I go by a knowledge of facts. Mr. H. (the plaintiff) is a rogue; and I can prove him to be so, by the books at S. Mr. H. pretends to say he has been as good as a father to him (meaning H. P.); but, you see, he has been robbing him. He has cheated Mr. P. of 2000*l*.: so you see what sort of a father he has been to him. I will so expose Mr. H. (the plaintiff), that he will not be able to hold up his head in T. pulpit, or any other. I said to Mr. P., I do not wish to see the books, but he desired me to come in and see them; and he told me he did not care who saw them. Mr. H. (the plaintiff) has out-generalled

him in every thing (meaning, that the plaintiff had taken an unfair advantage of the said H. P., and had conducted himself in an improper manner towards him in relation to and in connexion with the said partnership and the said accounts). Now, I do not go by what I have heard; but I know it to be true."

In the second count, the words charged were,—“Mr. H. (the plaintiff) has cheated Mr. P., his brother-in-law, of upwards of 2000*l*. Mr. H. (meaning the said E. H.) has been to S., and found all true as I represented to Mr. H. I wonder how any respectable person can countenance such a man by their presence. I have been advising some other persons to go to the Wesleyan chapel; as they would there hear plain honest men.”

The fifth count charged the defendant with having written and published, of and concerning the plaintiff, and of and concerning the said partnership transactions and accounts between the plaintiff and H. P., and of and concerning the said false and scandalous reports,—“It has all through been admitted, that Mr. H. (the plaintiff), in his dealings with relatives, kept clear of the meshes of the law. The charges brought against him are not founded on strictly illegal acts, but on overreaching, &c., &c., his late partner.”

The sixth count charged the defendant with having, in answer to a letter addressed to him by R. A. (the plaintiff's friend), containing, among other things, the following passage,—“You have even said in T., that Mr. H. (the plaintiff) has cheated his relations out of 2000*l*.”—written and published, of and concerning the plaintiff, and of and concerning the said partnership, and of and concerning the said accounts and money transactions between the plaintiff and H. P., and of and concerning the words referred to in the letter of R. A., as follows:—“I beg to tell you, that you do not understand the matters at all; that you have been grossly deceived; and that you are advocating a case the most disreputable that has come within my knowledge for many a day; and this you will freely admit, when the facts of it are fully comprehended: and this, my own opinion of the matter, is held in common with all the gentlemen and ministers who have heard both sides of the question,”—thereby meaning that the plaintiff had been and was guilty of improper and unbecoming conduct, and had behaved himself in a manner unworthy a preacher and minister as aforesaid.

The declaration then alleged for special damage, that the plaintiff had been injured in his calling as a minister and preacher, and brought into public scandal, &c., and that divers persons frequenting the said chapel at T., had withdrawn therefrom, and refused to permit the plaintiff to preach there, whereby the plaintiff had been prevented from obtaining profits, &c.

It appeared that the words charged in the first and second counts, were intended, and were understood, to convey an imputation that the plaintiff had taken advantage of his brother-in-law in the course of the partnership transactions and accounts, though by what precise means did not appear; and that the libels which were the subject of the fifth and sixth counts were written by the defendant in answer to a letter from the plaintiff's friend, R. A., who had been in correspondence with the defendant on the subject of the charges against the plaintiff, with the sanction and concurrence of the latter.

The only evidence of special damage, was, that of a witness who stated that the plaintiff had told him he was to receive 30*l*. a year for preaching in T. chapel; but there was no evidence as to the way in which that sum was to be raised, or who were the parties to pay it; neither was there any evidence that any of the congregation had absented themselves from the chapel in consequence of the reports, or that the plaintiff had sustained any pecuniary damage therefrom:—

Held, that, in the absence of proof of special damage, the words charged in the first and second counts,—not being spoken of the plaintiff in reference to his office of minister,—were not the subject of an action; and that the letters declared on in the fifth and sixth counts were in the nature of confidential and privileged communications.

THIS was an action upon the case for defamation. The declaration contained nine counts.

*294] The first count stated, that the plaintiff, before and *at the time of the committing, &c., was, and continued' to be, a minister of a certain sect of persons dissenting from the church of England, to wit, called or known as independents, and was from time to time called *295] *upon, and required and employed, to preach to a certain congregation of persons so dissenting as aforesaid, at a certain chapel situate and being, to wit, at Thatcham, in the county of Berks, for that

purpose regularly and in due form of law licensed and authorized by law, and had used and exercised, and at the said times thereafter mentioned, and each of them, did use and exercise, his said calling of such minister as aforesaid, and his said office of such preacher as aforesaid, with propriety and religious demeanour in all things thereto appertaining, and during all the time aforesaid was deriving great gains, &c., from his said calling, and, but for the said grievances, would have continued so to do; and that the plaintiff, until the committing of the said grievances as thereafter mentioned, was always reputed, esteemed, and accepted, by and amongst the said congregation, and his neighbours, and other good and worthy subjects of this realm to whom he was in anywise known, to be a person of piety, honesty, good name, fame, and credit: That the plaintiff had not ever been guilty, nor, until the time of the committing of the said grievances by the defendant thereafter mentioned, been suspected to have been guilty, of the offences and misconduct as therein-after stated to have been charged upon and imputed to him by the defendant: That, by means of the premises, the plaintiff, before the committing of the said grievances by the defendant as thereafter mentioned, had deservedly obtained the good opinion and credit of the said congregation, and of all his neighbours and other good and worthy subjects, &c., and had also thereby obtained, and was then duly and honestly acquiring great gains and profits in his said calling of minister and preacher as aforesaid, to the plaintiff's comfortable support and maintenance: That, long before the committing of the said grievances by the defendant as *thereinafter mentioned, to wit, up to, and until, a [*296 certain day and year preceding the committing of the said grievances, to wit, the 1st of January, 1841, the plaintiff had carried on, in partnership with Henry Pinhorn, the brother-in-law of the plaintiff, a certain trade or business, to wit, the trade and business of a linen-draper, in the town of Southampton, in the county of Southampton: That afterwards, and before the committing of the said grievances by the defendant as thereafter mentioned, to wit, on the 1st of June, 1841, the said partnership between the plaintiff and the said Henry Pinhorn was dissolved, and thereupon divers accounts and money transactions relating to the said business, and the said partnership, and the said dissolution of the said partnership, had arisen, existed, and taken place between the plaintiff and the said Henry Pinhorn: That afterwards, and before the committing of the said grievances by the defendant as thereafter mentioned, certain false and scandalous reports concerning the plaintiff, and concerning the said partnership accounts and money transactions, had been circulated among divers members of the congregation, to wit, at Thatcham aforesaid, which said reports were by the plaintiff supposed to have been so circulated as aforesaid by one Mrs. B., and thereupon, afterwards, and before the committing of the said grievances, to wit, on the day and year aforesaid, it was proposed that one Ed-

ward Hunt should examine into the said accounts and money transactions between the plaintiff and the said Henry Pinhorn, on the part of the plaintiff: That afterwards, a certain correspondence and discussion had taken place between the defendant and one Robert Ainslie, respecting, touching, and relating to the said partnership accounts and money transactions, and respecting, touching, and relating to the said reports: Yet that the defendant, well knowing the premises, but greatly
 *297] *envying the happy state and condition of the plaintiff, and contriving, and wickedly and maliciously intending to injure the plaintiff in his said good name, fame, and credit in his said office and character of minister and preacher as aforesaid, and otherwise, and to bring him into public scandal, infamy, and disgrace with and amongst the said congregation and all his neighbours and other good and worthy subjects of this realm, and to cause it to be suspected and believed by that congregation and those neighbours and subjects that the plaintiff had been, and was, guilty of the offences and misconduct thereafter stated to have been charged upon and imputed to him by the defendant, and to induce the said congregation to leave the said chapel, and to cause the plaintiff, to be deprived of the preachingship of the said chapel and congregation, to wit, at Thatcham aforesaid, and to vex, harass, &c., the plaintiff in his said calling and ministry, and otherwise, theretofore, to wit, on the 14th of March, 1845, in a certain discourse which the defendant then had of and concerning the plaintiff, and of and concerning him in his said calling and ministry, and of and concerning the said partnership, and the said accounts and money transactions with the said Henry Pinhorn, in the presence and hearing of divers good and worthy subjects of our lady the Queen, and then, in the presence and hearing of the said last-mentioned subjects, and in the presence and hearing of divers members of the said congregation, to wit, at Thatcham aforesaid, to wit, Sarah Pinnock and Edmund Pinnock, falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning him in his said ministry and calling, and of and concerning the said partnership, and of and concerning the said accounts, and of and concerning the said money transactions with the said Henry Pinhorn, the false, scandalous, malicious, and defa-
 *298] matory words *following, that is to say,—“ I (meaning the defendant) do not go by reports; I go by a knowledge of facts. Mr. Hopwood (meaning the plaintiff) is a rogue; and I can prove him to be so, by the books at Southampton (meaning the said books of account of the said partnership and business of the plaintiff and the said Henry Pinhorn). Mr. Hopwood (meaning the plaintiff) pretends to say he has been as good as a father to him (meaning the said Henry Pinhorn); but you see he (meaning the plaintiff) has been robbing him (meaning the said Henry Pinhorn). He has cheated Mr. Pinhorn (meaning the said Henry Pinhorn) of 2000*l.*: so you can see what sort of a father he (meaning the plaintiff) has been to him (meaning the said Henry Pin-

horn.) I will so expose Mr. Hopwood (meaning the plaintiff), that he (meaning the plaintiff) will not be able to hold up his head in Thatcham pulpit (meaning the pulpit of the said chapel), nor any other. I (meaning the defendant) said to Mr. Pinhorn (meaning the said Henry Pinhorn), I did not wish to see the books (meaning the said last-mentioned books): but he (meaning the said Henry Pinhorn) desired me to come in and see them; and he told me he did not care who saw them. Mr. Hopwood (meaning the plaintiff) has out-generalled him (meaning the said Henry Pinhorn) in everything (thereby meaning that the plaintiff had taken an unfair advantage of the said Henry Pinhorn, and had conducted himself in an improper manner towards him in relation to, and in connexion with, the said partnership and the said accounts). Now, I (meaning the defendant) do not go by what I have heard; but I know it to be true (thereby meaning that he, the defendant, knew it to be true that the plaintiff had taken such unfair advantage of the said Henry Pinhorn, and had so conducted himself in an improper manner towards him in relation to *and in connexion with the said partnership and the said [*299 accounts.)”

In the second count, the words charged to have been spoken, were,—“Mr. Hopwood (meaning the plaintiff) has cheated Mr. Pinhorn, his brother-in-law (meaning the said Henry Pinhorn), of upwards of 2000*l*. Mr. Hunt (meaning the said Edward Hunt) has been to Southampton, and found all true, as I (meaning the defendant) represented: and Mr. Hunt (meaning the said Edward Hunt) has washed his hands of it (meaning, the said proposed examination into the said accounts and money transactions between the plaintiff and the said Henry Pinhorn) altogether. I (meaning the defendant) wonder how any respectable person can countenance such a man (meaning such a man as the plaintiff) in their presence. I (meaning the defendant) have been advising some other persons to go to the Wesleyan chapel (meaning a chapel other than the said chapel at Thatcham), as they (meaning the said other persons) would there (meaning, at the said Wesleyan chapel) hear plain honest men (thereby meaning that the plaintiff was a dishonest person, and unfit to preach at the said chapel at Thatcham).”

The fifth count stated that the defendant, further contriving and intending as aforesaid, afterwards, to wit, on the 8th of August, 1845, unlawfully, falsely, and maliciously did compose and publish, and cause and procure to be composed and published, of and concerning the plaintiff, and of and concerning the said partnership transactions and accounts between the plaintiff and the said Henry Pinhorn, and of and concerning the said false and scandalous reports, a certain false, scandalous, malicious, and defamatory libel, contained in a letter then written and addressed by the defendant to the said Robert Ainslie, in which said *letter, [*800 among other things, were contained the false, scandalous, malicious, and defamatory matter of and concerning the plaintiff, and of and

concerning the said partnership transactions and accounts, and of and concerning the said false and scandalous reports, following, that is to say, "It has all through been admitted that Mr. H. (meaning the plaintiff), in his dealings with relatives (meaning the said partnership transactions and accounts), kept clear of the meshes of the law. The charges brought against him (meaning the plaintiff) are not founded on strictly illegal acts; but on overreaching, &c., &c., his late partner (meaning the said Henry Pinhorn, and thereby then meaning that the plaintiff had cheated and defrauded the said Henry Pinhorn in the said partnership transactions and accounts.)"

The sixth count stated that the defendant, further contriving as aforesaid, afterwards, to wit, on the 19th of August, 1845, in answer to a certain letter which before then, to wit, on the 15th of August, 1845, had been written and addressed by the said Robert Ainslie to the defendant, which contained, amongst other things, the words following, that is to say, "You (meaning the defendant) have, my dear Sir, even said in Thatcham (meaning in Thatcham aforesaid), that Mr. Hopwood (meaning the plaintiff) has cheated his (meaning the plaintiff's) relatives out of 2000*l.*," unlawfully, falsely, and maliciously did compose and publish, and cause and procure to be composed and published, of and concerning the plaintiff, and of and concerning the said partnership, and of and concerning the said accounts and money transactions between the plaintiff and the said Henry Pinhorn, and of and concerning the said supposed words in the said letter of the said Robert Ainslie, above alleged to have been spoken by the defendant, a certain false, scandalous, malicious, and defamatory libel, contained in a certain letter then addressed and written *301] tained, amongst other things, the false, scandalous, malicious, defamatory, and libellous matter of and concerning the plaintiff, and of and concerning the said partnership, and of and concerning the said accounts and money transactions between the plaintiff and the said Henry Pinhorn, and of and concerning the said supposed words in the said letter of the said Robert Ainslie, above alleged to have been spoken by the defendant, as follows, that is to say, "I (meaning the defendant) beg, then, to tell you (meaning the said Robert Ainslie), that you (meaning the said Robert Ainslie) do not understand the matters at all; that you (meaning the said Robert Ainslie) have been grossly deceived; and that you (meaning the said Robert Ainslie) are advocating a case (meaning the said case of the plaintiff) the most disreputable that has come within my (meaning the defendant's) knowledge for many a day: and this you (meaning the said Robert Ainslie) will freely admit, when the facts of it are fully comprehended. And this, my own (meaning the defendant's) opinion of the matter is held in common by all the gentlemen and ministers who have heard both sides of the question (thereby meaning that the plaintiff had been and was guilty of improper and unbecom-

ing conduct, and had behaved himself in a manner unworthy a preacher and minister as aforesaid)."

The remaining counts were abandoned.

The declaration concluded with averring, that, by means of the committing, &c., the plaintiff had been and was greatly injured in his good name, fame, and credit, and in his said calling as a minister and preacher as aforesaid, and brought into public scandal, infamy, and disgrace with and amongst the said congregation, to wit, at Thatcham aforesaid, and with and amongst all his neighbours and other good and worthy subjects of this *realm, insomuch that divers of those neighbours and subjects, to whom the innocence and integrity of the plaintiff in the [*302 premises were unknown, had, on account of the committing, &c., as aforesaid, from thence suspected and believed, and still did suspect and believe, the plaintiff to have been and to be a person guilty of the offences and misconduct above charged to have been imputed upon him, and to be a person wholly unfit and improper for his said ministry and calling as aforesaid, and had therefore wholly refused, and still did wholly refuse, to have any acquaintance or discourse with the plaintiff; and divers of the said persons so frequenting the said chapel, to wit, at Thatcham aforesaid, by reason of the committing of the said several grievances as aforesaid, had wholly withdrawn from the said chapel, and had wholly refused to suffer or permit the plaintiff to preach at the said chapel, as he had before the committing of the said grievances been wont to do, for divers great gains and profits in that behalf, and had withdrawn from the plaintiff their countenance and support; and the plaintiff had thereby been prevented from obtaining divers great gains, profits, and emoluments, which, but for the committing of the said several grievances by the defendant as aforesaid, would thereby have accrued to the plaintiff.

The defendant pleaded not guilty.

The cause was tried before WILDE, C. J., at the sittings in London, after Hilary term, 1847. The plaintiff was the minister of a dissenting chapel at Thatcham, near Newbury, in Berkshire. The defendant was the pastor of an independent congregation at Winchester. The circumstances under which the alleged slanderous words were spoken, and the libellous letters written, were these:—

The plaintiff, prior to his connexion with the congregation at Thatcham, had, in partnership with his *brother-in-law, Henry Pinhorn, carried on the business of a linen-draper at Southampton. Shortly [*303 after his arrival at Thatcham, certain rumours prejudicial to the character of the plaintiff, with reference to his transactions with Pinhorn, reached the ears of the congregation, and at a prayer-meeting of some of its members, on the 1st of November, 1844, some remarks fell from a Mrs. B., the wife of one of the deacons, which induced the plaintiff to read a paper from the pulpit of his chapel, after the service on Sunday, the 26th of January, 1845, to the following effect:—

"I think I may fairly presume that it is well known to most, if not to all, of you, that my character has been greatly scandalized by the wife of one of the deacons of this church, and that, too, with a zeal worthy of a better cause. It was my intention to have passed it by, as beneath my notice: and many of you can bear me witness, that, when you were anxious to acquaint me, I would not listen to what had been said. But, finding since that statements most flagitious have been made, and widely circulated, I am, from a sense of duty to myself, to the office which I sustain, and to the cause of truth, compelled to take some direct notice of them; otherwise, longer silence on my part might be, and probably would be, construed into conscious guilt. If the scandal had been confined to the church, I should have felt it my duty to have brought the matter before the church: but, as the statements have been made to members of the congregation, have been generally circulated through the congregation, and even through the village, so as to have become the talk of the public-house, I deem it advisable to speak in this public manner, and to demand of the party having made the statements, to substantiate them; that is, to prove them before persons who shall be thought by both *304] parties qualified to *investigate and to form a sound judgment, that, if I deserve to be branded as an infamous character, and a vile character, I may publicly receive the brand, and retire into the shade. 'This party,—the wife of one of the deacons of the church,—has said, speaking of me, that 'he is an infamous character—he is a vile character,' and much more to the same purpose. I, therefore, observe, *demand an investigation*, that it may not only be shown that my character is not vile or infamous, but that there is no foundation at all for the assertions. And I defy the aforesaid party to prove any one single thing to blot my moral character before men. If this demand be not met in a fair and open way, I shall ask of you to certify that the demand was made, and refused. I beg, moreover, to state that I decline any personal communication with the aforesaid party, or written communication from the party, but will appoint a friend, and hope that the aforesaid party will appoint another, that the matter may be thoroughly sifted."

In consequence of this requisition of the plaintiff, one Edward Hunt was appointed on the part of the plaintiff, and the defendant on the part of Mrs. B., to enter upon the investigation. In the course of the inquiry to which the defendant was thus invited, he had several interviews with Mr. Henry Pinhorn, at Southampton, and a good deal of correspondence took place between the defendant and Mr. Hunt; and it was upon one of these occasions, and with reference to the partnership transactions and dealings between the plaintiff and Henry Pinhorn, that the words charged in the first and second counts were spoken by the defendant.

The circumstances under which the words were spoken, and also those

under which the letters which formed the subject of the charges in the fifth and sixth *counts were written, are fully detailed in the judgment of the court; as also is the evidence offered on the [*305 part of the plaintiff at the trial to prove special damage from the speaking of the words.

A verdict having been taken for the plaintiff, on the first and second counts, for 250*l.*, and, on the fifth and sixth, for 100*l.*,

Talfourd, Serjt., in Easter term, 1847, obtained a rule nisi to enter a verdict for the defendant on the issues raised on those counts, or some of them, or to arrest the judgment, or for a new trial, as for a verdict against evidence. He cited *Parrat v. Carpenter*, Cro. Eliz. 502, *Noy*, 64, *Lumby v. Allday*, 1 C. & J. 301, 1 Tyrwh. 217, *Ayre v. Craven*, 2 Ad. & E. 2, 4 N. & M. 220, and *Pemberton v. Colls*, 10 Q. B. 461, 16 Law Journ., N. S., Q. B. 403. [WILDE, C. J., observed, that he thought at the trial, that the letters were written under circumstances which rendered them not actionable without proof of express malice,—having the case of *Blackburn v. Blackburn*, 4 Bingh. 395, 1 M. & P. 33, 3 C. & P. 146, in his mind at the time.]

Cockburn and *E. James*, in Easter term, 1848, showed cause. The words charged in the first and second counts, clearly were actionable, having been spoken of the plaintiff in his office or calling of a minister. [CRESSWELL, J. They were spoken of him when filling that office, but not concerning anything done by him in his office.] The slanderous words, it is true, were not spoken of the plaintiff in relation to his ministry; but they imputed to him conduct of a nature wholly to disqualify him for it. [CRESSWELL, J. *Ayre v. Craven* is very like this case.] The general rule of *law is, that injurious matter falsely spoken of a man in his profession, is actionable. If it imputes to the [*306 party such a degree of moral turpitude as to show him unfit for the office, an action lies. There are some callings,—and this is one,—in which moral worth and conduct are as essential as knowledge. *Ayre v. Craven* has confessedly gone to the very verge of absurdity. In *Pemberton v. Colls*, the words which were held to be actionable, had no reference to anything done by the plaintiff in his character of a minister of the gospel. [CRESSWELL, J. They imputed to him cheating and swindling while a clergyman: here, however, the transactions alluded to took place long before the plaintiff's character of a minister had existence.] To say of a clergyman that he has been guilty of conduct of this description, is calculated most materially to impair and destroy his utility as a clergyman. [WILDE, C. J. The question is, whether the misconduct is imputed to him in his character of minister. COLTMAN, J. The slander in question certainly does seem to have some reference to the plaintiff's clerical character: it alleges him to be unfit to fill the office of minister, by reason of his former alleged misconduct.] In *Lumby v. Allday*, the words spoken of the plaintiff had no immediate

connexion with his office of clerk of the gas company. The language of BAYLEY, B., is strongly in favour of the maintenance of this action. "Every authority," he says, "which I have been able to find, either shows the want of some general requisite, as, honesty, capacity, fidelity, &c., or connects the imputation with the plaintiff's office, trade, or business. As at present advised, therefore, I am of opinion that the charge proved in this case is not actionable, because the imputation it contains does not imply the want of any of those qualities which a clerk ought to possess, and because the imputation has no reference to his conduct as *307] clerk." *Applying that doctrine to this case,—the imputations here cast upon the plaintiff necessarily *do* imply a total want of those qualities which not only ought to be possessed by, but which are indispensably necessary to, a person filling the character of a clergyman. In *How v. Prin*, Sir J. Holt, 652, it was held to be actionable to say of a justice of peace and deputy-lieutenant of a county, that "he was a jacobite, and for bringing in the Prince of Wales and popery, to destroy the nation, &c.;" HOLT, C. J., saying,—“To charge one in a public office with ill principles that are of such a nature as make him unfit to bear that office or employment, is actionable: for, if he had such thoughts to bring in the pretended Prince of Wales into this kingdom, it is necessary he should be removed from his trust; and he, as justice of peace, ought to punish popery: sure, then, if such person is for introducing popery, he ought not to be trusted with an office the duty whereof is to punish and suppress it.”

Then, as to the fifth and sixth counts,—it is insisted, on the part of the defendant, that the letters addressed to Mr. Ainslee were equally privileged with those written to Mr. Hunt. They, however, clearly stand upon a totally different footing. The object of the correspondence with Mr. Hunt, was, the promotion of an investigation which the plaintiff had himself courted: whereas, it was perfectly clear, upon the evidence, that the correspondence with Mr. Ainslee was carried on maliciously, and not for any legitimate purpose: the investigation was then at an end. Nor can it be said that the communication was privileged, as relating to a matter essential to the interests of society.

As to the special damage,—it appeared that some of the congregation *308] had absented themselves from the *chapel. It is true, no persons were named who had ceased to attend: but that is not necessary in a case like this. [V. WILLIAMS, J. Where the naming the individuals would lead to inconvenient prolixity, the rule is relaxed.] In the case of a gin-shop, where the special damage consisted in the loss of customers, it would manifestly be impossible to name them. [V. WILLIAMS, J. *Hartley v. Herring*, 8 T. R. 130, seems an authority to show that the allegation of special damage here is sufficient. That was an action for consequential damage for slander imputing incontinence to the plaintiff; and it was held to be sufficient to state, that the plaintiff was

employed to preach to a dissenting congregation at a certain licensed chapel, that he derived considerable profit from his preaching, and that, by reason of the scandal, "persons frequenting the chapel had refused to permit him to preach there, and had discontinued giving him the profits which they usually had, and otherwise would have, given,"—without saying who those persons were, or by what authority they excluded him, or that he was a preacher duly qualified according to the 10 Ann. c. 2.

Talfourd, Serjt., and *Atherton*, in support of the rule. The words charged in the first and second counts are clearly not actionable *per se*. They are not alleged to have been spoken of the plaintiff in relation to his office or calling of a dissenting minister: all the innuendoes apply them to the partnership transactions between the plaintiff and Henry Pinhorn, and to a time anterior to the plaintiff's assumption of the ministry. They charge no indictable offence: and there is no special damage well alleged or proved. It is scarcely possible to conceive slander calculated more seriously to affect the *professional success of a physician, than that which was held not to be actionable in *Ayre v. Craven*. Lord DENMAN [*309 there says: "Some of the cases have proceeded to a length which can hardly fail to excite surprise; a clergyman having failed to obtain redress for the imputation of adultery,—*Parrat v. Carpenter*, Noy, 64, Cro. Eliz. 502,—and a schoolmistress having been declared incompetent to maintain an action for a charge of prostitution,—per TWISDEN, J., in *Wharton v. Brook*, 1 Ventr. 21.(a) Such words were undeniably calculated to injure the success of the plaintiffs in their several professions; but, not being applicable to their conduct therein, no action lay." Suppose the defendant, in that case, had gone on to say,—“I will so expose Dr. Ayre that he will not be able to obtain admission to a single family in Hull,”—would that have made any difference? These words would merely have supported the colloquium: but they would have had no effect beyond that. *Lumby v. Allday* also shows that words, to be actionable as spoken of a man in his office, must be spoken of him *in reference to his character or conduct in such office*. *Pemberton v. Colls* is decisive: it marks precisely the distinction between what is, and what is not, spoken of the party in reference to his office or calling. The first count of the declaration there stated words spoken of the plaintiff in his profession, as follows,—with innuendoes, and an inducement stating only that the plaintiff was vicar of a church, and the defendant a clergyman, and that the plaintiff had always conducted himself well in his profession,—“The very day I came into residence, Dr. Pemberton (the plaintiff) sent for me: I went, and dined with him; and the wine must have been drugged, for, I took but two glasses, and was quite stupified. While in this condition, Dr. Pemberton put a bill into *my hands, and requested me to sign it, saying, ‘I wish to have it as a security for the payment [*310 of 130*l.* per annum for reading for you at the new church.’ I answered,

(a) And see *Welby v. Elston*, *ant*2, p. 142.

‘Well, give me a pen, and I will sign it.’ Immediately I had signed it, Dr. Pemberton snatched it up, and, laughing, said, ‘This will be quite safe.’ The bill, I think, was drawn for 2500*l.* or 2600*l.*: but, having been stupefied with the wine, I do not rightly remember. You cannot suppose that I can visit a man who so cheated me at my first coming,”—innuendo, that the plaintiff fraudulently obtained the bill from the defendant while he was stupefied with drugged wine. The second count stated the words spoken of the plaintiff in his profession,—with innuendoes, but no farther material inducement,—as follows: “Dr. Pemberton placed before me a bill. I signed. I do not know for what amount it was, whether for 2000*l.* or 3000*l.*; for, I was completely pigeoned by Dr. Pemberton,”—innuendo, that the plaintiff had obtained the bill from the defendant by fraud. The declaration alleged, for special damage, that the plaintiff’s curate believed him guilty of the misconduct, and, by reason thereof, was prevented from cordially and effectually assisting the plaintiff in the clerical duties and spiritual concerns of the parish. After verdict for the plaintiff, it was held, on a motion in arrest of judgment,—that the first count was good, because the words therein set forth reflected upon the plaintiff in his profession: but that the second count was bad, because the words there did *not* so reflect. That case, it is conceived, presents the true principle for the decision of this. It is not because the party is a clergyman, that any peculiar injury to his prospects would necessarily result from an imputation of dishonesty. There is but one rule of moral conduct propounded for all men. The quality, the presence *311] or absence of which is imputed, must have a special *reference to the calling or profession of the plaintiff. To impute to a clergyman or a physician want of legal, or to an attorney want of theological or medical, knowledge, would be no offence. In *Hartley v. Herring*, the plaintiff lost his office: *all* the congregation were alleged to have left the church. The special damage must be a direct consequence of the speaking of the words to the person to whom they were addressed, not of the illegal repetition of them by another. [WILDE, C. J., referred to *Ward v. Weeks*, 7 Bingh. 211, 4 M. & P. 796.(a)]

With respect to the fifth and sixth counts, the alleged libellous letters were clearly written under circumstances which rendered the writing of them privileged. They were communications addressed by the defendant to a gentleman, who, as the plaintiff’s friend, had been deputed with him to inquire into certain charges which had been whispered against the plaintiff: and, although that inquiry was at an end when the letters in question were written, the defendant might fairly consider, from the circumstances, that the communications would still be privileged.(b)

Cur. adv. vult.

WILDE, C. J., now delivered the judgment of the court.

(a) And see *Edsall v. Russell*, 4 M. & G. 1090, 5 Scott, N. R. 801.

(b) It would seem to be immaterial whether the defendant *believed* the communications to be privileged or not.

This was an action to recover damages for verbal and written slander. The declaration contained nine counts. The first and second counts were founded upon the verbal slander; the third and fourth counts, and also the seventh, eighth, and ninth counts, were abandoned at the trial, and it is, therefore, unnecessary to advert to them; and the fifth and sixth counts were framed upon the written slander.

*A verdict was found for the plaintiff upon the first and second counts, with 150*l.* damages; and upon the fifth and sixth counts [*312 a verdict was found for him, with 100*l.* damages.

A rule has been obtained by the defendant, calling upon the plaintiff to show cause why a verdict should not be entered for the defendant upon the first, second, fifth, and sixth counts, or such of them as the court should think fit, or why the judgment should not be arrested, or why there should not be a new trial.

Upon the argument of the rule before us, the questions were,—first, whether the words which formed the subject-matter of complaint in the first and second counts were actionable, either by reason of the imputations conveyed in them, or by reason of their having been uttered in relation to the plaintiff's profession, character, or office of a dissenting minister, or by reason of special damage, properly alleged, resulting from them, and of which evidence was given at the trial; and, as to the fifth and sixth counts, whether, on the evidence given at the trial, the letters which contained the alleged defamatory matter, were written under circumstances entitling them to be considered as a privileged communication: and a further question was made, whether, if the words in the first and second counts were actionable only by reason of special damage, special damage was properly alleged in the declaration.

We have considered the several points which have been argued; and, first, with regard to the verbal slander. The inducement states, that, before the committing of the grievances, the plaintiff had been in trade, in partnership with one Pinhorn, his brother-in-law; that the partnership had been dissolved, and that certain false and scandalous reports concerning the plaintiff, and concerning the said partnership accounts and money transactions, had been circulated; and that the *defendant, in a certain discourse of and concerning the plaintiff, [*313 and of and concerning him in his calling and ministry, and of and concerning the matter before set forth, had said—"He is a rogue; and I can prove him to be so, by books. He pretends he has been as good as a father to him; but you see he has been robbing him. He has cheated Mr. Pinhorn of 2000*l.*; so you see what sort of a father he is. I will so expose him that he shall not be able to hold up his head in Thatcham pulpit or any other. He has out-generalled him in everything."

The words complained of in the second count, are—"He has cheated his brother-in-law of upwards of 2000*l.* I wonder how any respectable person can countenance such a man by their presence. I have been

advising some persons to go to the Wesleyan chapel; for, they would there hear plain honest men."

The words set forth in these counts were uttered in the course of some lengthy communications referring to transactions between the plaintiff and Pinhorn; and the context with which the words complained of were connected, fully explained the sense in which they were used, and that the imputation intended to be conveyed, and which, as the evidence showed, was understood by them, was, that the plaintiff had taken advantage of his brother-in-law, in the course of their partnership transactions, and had obtained a great pecuniary advantage in the adjustment of their accounts; but by what precise means that was imputed to have been accomplished, was not explained. The words had no relation to any conduct pursued by the plaintiff as a minister, or connexion with any of the duties of his office; although the defendant alleged that the plaintiff was unfit to be a minister, by reason of misconduct at a former period, before he became a minister, and when he was a tradesman.

*314] The words themselves are clearly not actionable *per se*: and *the authorities referred to in the course of the argument, establish that they cannot be deemed to have been spoken of the plaintiff in his character or office of a minister, in any sense which will subject the defendant to an action in that respect. It is, therefore, only upon proof of special damage having resulted from the speaking of the words, that the action can be maintained. But, upon reference to the evidence, it is clear no such damage was proved. The only evidence applicable to that subject, is, that a witness stated that the plaintiff had told him that he was to receive 30*l.* a year as his remuneration for his ministerial duties; but nothing was said of the mode in which such sum was to be raised, or of the parties by whom it was to be paid. It was also stated that rents were paid for the occupation of the pews: but, by whom received, or how applied, there was no evidence. It was further stated, that the attendance at the chapel had lately diminished in number; but, from what cause, or whether the parties seceding were pew-renters, or contributors in any way to the funds of the meeting, did not appear. It was also proved, that, before the uttering of the words complained of, the plaintiff had determined to quit his office of minister of that meeting, and had given notice to the congregation of such his intention. It was likewise proved that there had been such very unusual and unseemly altercations during divine service, as might reasonably account for a diminution of the number of attendants at the meeting or chapel: and there was no evidence that could properly be submitted to the jury, to authorize them to find, as a fact, that any one person had ceased to attend in consequence of the words complained of, or that the plaintiff had sustained any pecuniary damage whatever.

*315] In the absence, therefore, of all evidence of any diminution of the number of attendants at the chapel, or *of any pecuniary

loss or damage in consequence of the imputation made by the defendant against the plaintiff, unless the words themselves are actionable, the plaintiff has no cause of action: and the authorities show, that, in point of law, such words are not actionable.

Secondly,—with respect to the written matter complained of,—the question is, whether the letters in which such matter was contained, were written under circumstances which brought them within the principle recognised, of a privileged communication.

It appears that the plaintiff had desired that an investigation should take place into the truth of some charges which had been made by a Mrs. B., who was a member of the congregation over which the plaintiff presided, and that the defendant had acted as Mrs. B.'s representative and advocate during those investigations; that, after some meetings, and various communications had taken place upon the subject, a Mr. Ainslie, a dissenting minister, had been invited by the plaintiff to pursue the investigation on his behalf; that, in the course of doing so, Mr. Ainslie had had an interview with a Mr. Pinhorn, of Southampton, from whom it was supposed and alleged the charges against the plaintiff had originated; and that, after such interview, Mr. Ainslie had, in the defendant's absence, called at the defendant's residence, for the purpose of communicating with him upon the subject of those charges. It further appeared that the defendant, upon being informed of the application of the plaintiff's friend, Mr. Ainslie, had written to Mr. Ainslie upon the subject, and that the letters complained of were written in the course of a correspondence between the defendant, who had been acting as the friend and advocate of Mrs. B., and Mr. Ainslie, the advocate of the plaintiff. And it further appeared that this correspondence was carried on by Ainslie in concurrence with the plaintiff, who furnished the materials for Ainslie's answers to the defendant's letters.

*The result is, that the communication between the defendant and Ainslie arose out of an invitation to the defendant, made by [316 the plaintiff's friend, with his concurrence, to enter into a discussion upon the charges made against the plaintiff in respect of his transactions with Pinhorn, and that Ainslie must be considered as representing the plaintiff, in the correspondence that took place. And it seems to the court that the letters written in relation to the matters under discussion, fall within the principles of a privileged communication. The sole object of Ainslie's communication with the defendant, was, to discuss the matters the defendant alleged against the plaintiff, with a view of establishing that the imputations made against the plaintiff were unfounded, and with the intention of the result being made known to the congregation.

Attending, therefore, to the circumstances under which the letters were written, we think that they constituted a privileged communication, for which, under the circumstances of this case, no action can be maintained. And, as we think that no action can be maintained for the

verbal slander which forms the subject of the first and second counts, or for the written slander which forms the subject of the fifth and six counts, and as no evidence was offered in support of the other counts in the declaration, a nonsuit must be entered.

The view thus entertained by the court renders it unnecessary to express any opinion upon the other points which have been argued in the course of the case.

Rule absolute.

*317] *CHARLES FREDERICK AUGUSTUS WILLIAM, Sovereign Duke of BRUNSWICK and LUNEBURG, v. ABRAHAM SLOWMAN, JOHN BAKER, JOHN TOWNSHEND, JAMES MILES, and BENJAMIN BROWN. June 25.

Where a plea justifies a trespass under a *fi. fa.*, on the ground that the outer door was open at the time of the entry and seizure, that allegation is put in issue by the replication *de injuriâ*.

A., a sheriff's officer, to whom a writ of *fi. fa.* was directed, offered, for a pecuniary consideration, to delay its execution for a few days. B., who exercised the office of bailiff to the sheriff, in partnership with A., afterwards illegally executed the writ by breaking open an outer door; and A. subsequently withdrew his men from possession on payment of the amount endorsed on the writ, and of a *bonus* to himself:—Held, sufficient to warrant the jury in finding A. to be a co-trespasser, as having authorized the unlawful act of his partner B.

In such a case, the damages are peculiarly in the discretion of the jury: and they may include the sum paid for the withdrawal of the execution.

Quære, to what extent a seizure of goods under a *fi. fa.* can be justified, when properly pleaded, where the possession of the goods has been illegally obtained.

THIS was an action of trespass brought by His Serene Highness the Duke of Brunswick against Slowman and Baker, officers of the sheriff of Middlesex, Townshend, an attorney, and Miles and Brown, assistants to the officers, for *breaking and entering* the plaintiff's dwelling-house, making a noise and disturbance therein, breaking open doors, seizing his goods and chattels, and compelling him to pay a sum of money to induce them to withdraw from possession.

The defendants severally pleaded not guilty, and also a justification of all the trespasses complained of,—except that Slowman justified only the entry and seizure,—under a writ of *feri facias*, at the suit of one Charlotte Munden, against the goods and chattels of the plaintiff, for 200*l.* debt, 9*l.* 10*s.* damages, and 4*l.* *per cent.* interest,—the outer door being at the time open.

The plaintiff joined issue on the plea of not guilty, and, admitting the writ, replied *de injuriâ, absque residuo causæ*, to the pleas of justification.

*318] *The cause was tried before WILDE, C. J., at the sittings at Westminster, after Hilary term, 1848. It appeared that the defendants Slowman and Baker, who were in partnership as officers of the sheriff of Middlesex, having in their hands a *fi. fa.* against the goods of the Duke of Brunswick, upon a judgment obtained against him at the

suit of one Charlotte Munden, Baker, on the 15th of May, 1847, accompanied by his assistants Miles and Brown, and by Townshend, the attorney of the execution-creditor, proceeded to the duke's mansion in the Regent's Park, for the purpose of making a levy. The officers, taking advantage of the gate's being opened for the purpose of letting in some one else, rushed in, and, as was alleged by the plaintiff's witnesses, broke open the front door and so effected a seizure.

On the other hand, several witnesses, called on the part of the defendants, as distinctly swore, that the outer door of the house was open when they first gained access to the garden; and that, one of the officers having entered the house, and having been forcibly ejected by the plaintiff's porter, the officers, assisted by Townshend, again broke in, and made the levy.

It did not appear that Slowman was present during any part of the transaction; but it was proved, that, before the levy was made, he had called upon the duke's attorney, and offered, for a consideration of 20*l.*, to delay the execution for a few days, as he had been informed that the duke purposed to apply for an injunction. It further appeared, that the plaintiff tendered (under protest) to Baker the amount endorsed on the writ, but that Baker declined to accept it, or to withdraw, without the assent of Slowman, and Slowman declined to assent except on payment to him of a *bonus* of 20*l.*; and that ultimately that sum, together with the amount directed to be levied under the writ, having been tendered to Slowman, under protest, was accepted, and the officers withdrawn.

*The learned judge left the case to the jury upon the whole of the evidence,—telling them, that, if they were of opinion that the plaintiff had paid the money in order to induce the defendants to withdraw the execution, they might give the amount so exacted, as part of the damages. [*319]

The jury returned a verdict for the plaintiff, damages 720*l.*, observing that that sum was meant to include the 220*l.* paid by the plaintiff to induce the defendants to withdraw the execution.

In the following Easter term,

E. James, for the defendants Baker and Brown, and *Wilkins*, Serjt., for Townshend and Miles, obtained rules nisi for a new trial, on the ground that the verdict was against evidence, and upon affidavits, or to reduce the damages.

The affidavits were those of Charles Burrows and Henry Archer, police constables (who had both been examined as witnesses for the defendants at the trial), and of Charles Cadwell, a sheriff's officer's assistant, and John Baker, one of the defendants. The affidavits of Burrows and Archer stated, in substance, that Bate, the plaintiff's porter, had, in the course of conversation with them, while on duty at the spot, admitted that the sheriff's officer (meaning Baker) had rushed by him through the garden gate, when he, the porter, opened it to admit some one else, and that the

officer then ran across the garden, and up the hall steps into the hall, and thence into his, the porter's room, and that he, Bate, ran after him, and took him by the trowsers and back of his neck, dragged him out of the house, and threw him on the gravel-walk. Cadwell's affidavit alleged a similar conversation to have taken place between himself and Bate, whilst he, Cadwell, was remaining in possession under the *fi. fa.* at the plaintiff's *320] house. Baker, in his affidavit, stated, that, immediately the garden gate was opened by the porter, he rushed in, ran across the garden and up the steps into the hall, the door being open, and went into a room, which he believed to be Bate's room; that, whilst there, and while he was in the act of pulling out his warrant, Bate entered, and caught hold of him, and dragged him out, and threw him down on the gravel-walk in the garden; and that the writ had been returned *feri feci*.

Byles, Serjt., on behalf of Slowman, obtained a similar rule, and also to enter a verdict for him on the second issue, on the ground that he was not present at the time of the alleged trespass, and that what was done by him before and after the transaction, did not render him liable as a co-trespasser. The learned serjeant submitted, that, as regarded the 220*l.*, that sum had been improperly included in the damages, inasmuch as it appeared that there had been a legal judgment and execution against the present plaintiff for that sum, and that he had paid it to the sheriff, who had handed it over to the execution-creditor. And he referred to the Year Book, 18 E. 4, fo. 4, a, (a) (cited with approbation in *Semayne's* case, 5 Co. Rep. 91,) and also to Bac. Abr. *Execution* (N.) pl. 7, (b) and *Yates v. Delamayne*, cited in Bac. Abr. tit. *Execution*, (N.).

Allen, Serjeant, *Lush*, and *Henniker*, showed cause. There was evidence on both sides; and, the case being one peculiarly for the consideration of a jury, and there having been no manifest wrong done in the conclusion to which they came, there is no pretence for disturbing *321] the verdict. And, with regard to the affidavits, two of them are by witnesses who were examined at the trial, and all refer to a matter which was then before the jury; and therefore they can hardly afford ground for a new trial.

The damages were peculiarly for the determination of the jury. In *Kerby v. Denby*, 1 M. & W. 336, Tyrwh. & Gr. 688, upon a motion to reduce the damages, in an action for breaking and entering the plaintiff's dwelling-house, and assaulting and imprisoning him, under colour of a writ of *ca. sa.*, Lord ABINGER said: "I think, if I had tried the cause, I should probably have said, that, if parties, knowing what the law is, wantonly violate it, the jury should not be sparing in the damages. It is the safest way to say, that he who knowingly violates the law in one respect, must take all the consequences."

(a) An answer by LITTLETON, J., with the assent of the other justices of C. P., to a case put by *Catesby*, K. B.

(b) Citing *Semayne's* case.

It is said that the learned judge who tried the cause was wrong in telling the jury that they were at liberty to include in their estimate of damages, the amount of the levy endorsed on the writ. A *dictum* in Semayne's case, 5 Co. Rep. 93 a, is relied on to show that the execution having been executed, and the money levied and paid over to the execution-creditor, it cannot be recovered back. That *dictum*,—which is as follows, "It is said in 18 E. 4, 4 a, by LITTLETON, and all his companions, it is resolved that the sheriff cannot break the defendant's house by force of a *feri facias*, but he is a trespasser by the breaking, and yet the execution which he then doth in the house is good,"—is copied in Bac. Abr. *Execution* (N), pl. 7, where the following is added in a note,—“In Trinity term, 17. G. 3, in the cause of Yates and Others v. Delamayne, the court set aside an execution levied on the defendant's goods in his dwelling-house, because the officer forcibly broke into the house to execute the writ.” In Buckenham v. Francis, 11 J. B. Moore, 40, in *trespass for breaking open the [*322 outer door of the plaintiff's dwelling-house, &c., a plea justifying the entry, generally, under a *pluries fi. fa.*, not averring that the outer door was open at the time of the entry, was held bad, on special demurrer. Kerbey v. Denby is an authority to the same effect. That was an action of trespass for breaking and entering the plaintiff's dwelling-house, and assaulting and imprisoning him, &c. The defendants pleaded,—first, not guilty,—secondly, as to all the trespasses alleged, except the *breaking* of the dwelling-house, a justification under a writ of *ca. sa.* and warrant thereon, by virtue of which the defendants entered the house, the *outer door being open*, and arrested the plaintiff. The plaintiff replied (admitting the writ and warrant) *de injuriâ suâ propriâ absque residuo causæ*. It was proved that the defendants, who were bailiffs, in execution of the warrant, broke open the outer door of the plaintiff's house, and so gained an entrance, and arrested him. And it was held, that the averment in the plea, that the outer door was open, was a material averment, for, that the door's being open was a *condition precedent* to the defendant's right to enter and arrest the plaintiff in his house; and therefore that the plea was sufficiently traversed by the general replication, and it was not necessary to reply the breaking of the outer door. PARKE, B., in that case, says: “I believe the result of the uniform course of precedents will be found to be, that the door being open is a condition precedent to executing the writ in the dwelling-house, and therefore that the averment is material: and, if so, it is well traversed by the replication *de injuriâ absque residuo causæ*.” If an execution under a *fi. fa.* illegally executed may be upheld, it is difficult to say why an execution under a *ca. sa.* should not also be valid. This court, in Barrett v. Price, 9 Bingh. 566, 2 M. & Scott, 634, 1 Dowl. P. C. 725, held, that, where a *sheriff had illegally arrested the [*323 defendant under one writ, he could not lawfully detain him under another writ in his hands at the time: and, in Hodgson v. Towing, 5

Dowl. P. C. 410, where the defendant had been arrested on a *ca. sa.*, to execute which the sheriff's officer had broken an outer door, PATTESON, J., discharged him out of custody. [WILDE, C. J. If the law were not so, much time was unnecessarily wasted, in *Lee v. Gansel*, Cowp. 1, in discussing whether the door which was broken open, was an outer or an inner door.]

The only remaining question is, whether the defendant Slowman was, under the circumstances, responsible with the other defendants for the trespasses committed by them. The warrant was, it appears, directed to Slowman and his partner Baker. Before the execution, Slowman proposed to the plaintiff's attorney to delay enforcing it for a few days, upon his being paid a gratuity of 20*l.* And, after the seizure, when applied to for his assent to the withdrawal of the officers from possession, Slowman declined to give it unless he received the 20*l.*; and the money was paid to him under protest. Slowman thus so far identified himself with the trespass, as to render him liable for all the consequences. *M'Laughlin v. Pryor*, 4 M. & G. 48, 4 Scott, N. R. 655, is very analogous to the present case. There, the defendant and others hired a job-carriage and four post-horses, with two postillions, to go to Epsom races: on the road, the postillions, in "cutting in" to the line formed for the purpose of passing through a toll-gate, overturned a gig in which the plaintiff was seated, and severely injured him: after the accident had happened, the defendant, who was on the driving-box, offered money to the injured party, and gave his card; and, upon the owner of the gig *324] afterwards calling upon him, *the defendant observed that "cutting in" was all fair upon such occasions, and that "*he intended, if the gig had gone quietly out, to have pulled up to let it in again.*" It was held, that the jury were warranted in inferring that the postillions had acted as they did with the sanction of the defendant, and consequently that he was liable in *trespass* for the injury done. TINDAL, C. J., in his judgment in that case, evidently relies more upon the conduct of the defendant after the transaction, than upon what was actually done by him, or by his direction, before. All that was decided in *Wilson v. Tuman*, 6 M. & G. 236, 6 Scott, N. R. 894, which will probably be cited on the other side, was, that a bare assent by A. to a trespass already committed by B., is not equivalent to a previous command, and therefore will not make A. a trespasser. That has no application here.

Byles, Serjt., and *Bramwell*, appeared to support the rule obtained on behalf of Slowman. The defendant Slowman clearly was entitled to a verdict on not guilty: he took no part in the trespass, if any was committed; nor did he ratify it by his subsequent conduct. What is alleged to have passed between him and the plaintiff's attorney before the levy, clearly cannot make him liable. To render him responsible, as a co-trespasser, he must be shown to have authorized or directed it. In *Robinson v. Vaughton*, 8 C. & P. 252, ALDERSON, B., says (8 C. & P. 255):

"If I give a man leave to go on a field over which I have no right, and he goes, that will not make me a trespasser: but, if I desire him to go and do it, and then he does it, that is a doing of it by my authority, which is quite a different thing, and I should be liable." In Comyns's Digest,^(a) it is said that trespass lies "against *all who procure or command the trespass; or against him who afterwards assents to a trespass done for his use or benefit, [*325 though not privy at the time of doing it." Here, the act complained of was not done at the command of Slowman; nor was it done in his name, or for his benefit. Even if he expressly ratified it, therefore, he would not be liable. *Wilson v. Tumman* is precisely in point. It was there held, that where A. does an act as agent for B., without any communication with C., C. cannot, by afterwards adopting that act, make A. his agent, and thereby incur any liability, or take any benefit, under the act of A. TINDAL, C. J., in delivering the judgment of the court, there says: "That an act done *for another* by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well-established rule of law. In that case, the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent as by, and with all the consequences which follow from, the same act done by his *previous* authority. Such was the precise distinction taken in the Year Book, 7 H. 4, fo. 35,^(b)—that, if the bailiff took the heriot, claiming property in it himself, the subsequent agreement of the lord would not amount to a ratification of his authority *as* bailiff at the time: but, if he took it at the time as bailiff of the lord, the subsequent ratification by the lord made him bailiff at the time. The same distinction is also laid down by ANDERSON, C. J., in Godbolt's Reports, 109: 'If one have cause to distrain my goods, and a stranger, of his own wrong, without any warrant or authority given him by the *other, takes my goods, not as bailiff or servant to the [*326 other, and I bring an action of trespass against him, can he excuse himself by saying that he did it as his bailiff or servant? Can he also father his misdemeanor upon another? He cannot; for, once he was a trespasser, and his intent was manifest.' In the present case, the sheriff's officers, who were the original trespassers by taking the goods of the plaintiffs, were not servants or agents of the defendant Tumman, but the agents of a public officer or minister, obeying the mandate of a court of justice. They did not assume to act at the time as agents or bailiffs of the then plaintiff, Tumman; but they acted as the servants of another, viz. the sheriff, by virtue of the process directed to him by the court." So, here, the acts complained of were not done in the name of Slowman, but by parties acting in the name and under

(a) Title *Trespass* (C. 1), citing 4 Inst. 317.

(b) H. 7 H. 4, fo. 24, pl. 1.

the authority of the sheriff; Slowman, therefore, could not ratify them. [V. WILLIAMS, J. Was there *no* evidence of previous authority here?] Only of authority to levy in a lawful manner. In *Lyons v. Martin*, 8 Ad. & E. 512, 8 N. & P. 509, it is laid down, that a master is answerable in trespass for damage occasioned by his servant's negligence in doing a lawful act in the course of his service, but not so if the act is, in itself, unlawful, and is not proved to have been authorized by the master,—as, if a servant authorized merely to distrain cattle damage feasant drives cattle from the highway into his master's close, and there distrains them.

Semayne's case is a distinct authority to show that the execution itself is valid, although the officers may be liable for having levied it in an unlawful manner. *A. fi. fa.* differs from a *ca. sa.* in this, that, in the case of the latter, the rights of third parties would be interfered with by invalidating the execution: and it may *well be that the law *327] justifies a stricter construction in the case of a *ca. sa.*, out of regard to the liberty of the subject. The sheriff could not return *nulla bona*. [WILDE, C. J. Why not?] He had in fact levied the money. The plaintiff has had the advantage of the payment, in discharge of the execution; he surely cannot be allowed to have it in the shape of damages also.

Wilkins, Serjt., and *Oleasby*, in support of the rule obtained by Townshend and Miles,, and *E. James*, in support of that obtained by Baker and Brown, relied principally on the verdict being against the weight of evidence, and the damages excessive. *Cur. adv. vult.*

COLTMAN, J., now delivered the judgment of the court.(a)

This was an action of trespass, in which the plaintiff complained of the outer door of his house having been broken open, and his goods having been seized, and of his having been compelled to pay a certain sum of money to induce the trespassers to withdraw from his house.

The defendants severally pleaded not guilty; and the defendant Slowman also pleaded a special plea, not justifying the breaking, but justifying the entry and seizure of the goods under a writ of *fi. fa.* against the plaintiff; the plea alleging the outer door of the house to have been open at the time of the entry.

A verdict was found for the plaintiff, with 750*l.* damages, the jury having stated that the sum which had been paid to induce the trespassers to withdraw, was included in that amount of damages.

*A rule nisi was granted for a new trial, upon several grounds, *328] —first, that the verdict was against the evidence,—secondly, upon affidavits,—thirdly, upon the ground of excessive damages. The rule also called upon the plaintiff to show cause why the damages should not be reduced to the sum of 500*l.*, by deducting the sum which had been paid to the defendant Slowman; such sum being, the amount of the levy

(a) WILDE, C. J., COLTMAN, J., CRESSWELL, J., and V. WILLIAMS, J.

endorsed on the writ of *fiery facias*, under colour of which the parties had committed the trespasses complained of.

The defendant Slowman also obtained a rule nisi for a new trial, upon the ground,—first, that the verdict against him was not supported by the evidence, he not having been present at the time the original trespass was committed, by breaking open the outer door,—secondly, that he had not made himself party to such trespass, by any subsequent conduct,—thirdly, that no subsequent adoption could, in point of law, make him responsible as a party to the original trespass.

Upon the discussion of the rule by the counsel for the several parties, the evidence given at the trial was minutely investigated and presented to our attention: and, upon consideration of that evidence, we are of opinion that the verdict was consistent with it, and that the rule nisi ought not to be made absolute, upon the ground that the verdict was against the evidence.

There was, no doubt, a great conflict of testimony upon the trial,—positive evidence being given upon both sides; and the decision depended upon the credit to be given to the different witnesses: and, upon an attentive consideration of the evidence, it is clear that that given on the part of the plaintiff, if believed, warranted the jury in giving the verdict which they found: and, as the credit of the witnesses was a matter peculiarly within the province of the jury, the arguments *urged on the part of the defendants have not satisfied us that the conclusion [*329 to which the jury came was erroneous; and therefore we are not authorized to set aside the verdict which they have pronounced; and we are of opinion that further inquiry would not be likely to render the truth of the case more apparent.

With regard to the affidavits which have been filed, it is to be observed that Burrows and Archer, two of the deponents, were called upon the trial, and might have been examined upon the matters stated in their affidavit; and, further, that it appears that the jury did not adopt the testimony which they in fact did give; and the affidavits made by them do not furnish any grounds for disturbing the verdict.

As to Cadwell, the other deponent, the evidence which it is suggested he would give upon a future trial, relates to alleged declarations by Bates, of the same import as those which had been imputed to him by several witnesses examined on the part of the defendant upon the trial; and the verdict shows that the jury gave credit to Bates, and not to the defendants' witnesses. And, further, it is not stated that Cadwell was not in attendance upon the trial. Considering, therefore, that Bates's credit in regard to his denial of the same expressions as are sworn to by Cadwell and the several witnesses already examined on the part of the defendant, has already been submitted to the jury, we do not think that Cadwell's affidavit furnishes sufficient ground for granting a new trial.

With respect to the damages being excessive,—the trespasses com-

plained of were of a very serious nature ; such trespasses having been committed by officers of the law, under colour of the law, breaking open the outer door with great violence. Such conduct is calculated to lead to dangerous conflicts ; and, when it is *proved, to the satisfaction *330] of a jury, to have taken place, the proper amount of damages to be awarded must depend so much upon the general circumstances, that it is very difficult to discover any standard by which to measure the amount : much must be left to the discretion of the jury ; and the court cannot upon the present occasion perceive any ground which calls upon it to set aside the verdict which they have found, upon the objection to the amount of damages.

As to that part of the rule which asks to reduce the damages by the amount of the levy endorsed on the writ of *feri facias*, it is to be observed that the only plea of justification under the writ of *feri facias*, is a plea which alleges that the defendants entered for the purpose of making the levy, the outer door being open ; and that allegation was a material and substantial part of the plea, (a) which was put in issue by the replication *de injuriâ*. The jury by their verdict found that allegation to be disproved ; which entitled the plaintiff to a verdict upon the issue joined on that plea : and the only other plea upon the record was the plea of not guilty, the issue upon which was also found for the plaintiff. The defendants, therefore, could not avail themselves of the writ of *feri facias* under the plea of the general issue, and were, upon the state of the record, without defence in regard to the amount exacted to induce them to withdraw from the possession of the plaintiff's house : the jury were warranted in including the amount so exacted in the damages : and the consequence is, that there is no ground for reducing the verdict, by deducting that amount.

*331] The state of the record before mentioned renders it *unnecessary to consider how far, and to what extent, a levy under a writ of *fi. fa.* can be justified, where properly pleaded, when the possession of the goods has been illegally obtained.

The remaining point relates to the objections urged on the part of the defendant Slowman,—the question being, whether there was evidence proper to be submitted to the jury, of his having authorized the original trespass. It appears by the evidence, that the warrant granted by the sheriff of Middlesex, upon the writ of *feri facias* against the plaintiff, was directed to Slowman and his partner, Baker ; and that, Slowman, having heard that the plaintiff wished to postpone the execution of the writ for a few days, in order that he might apply to a court of equity for an injunction, he informed the plaintiff's attorney that he would forbear to levy under the writ for a few days, provided the plaintiff would give him 20*l.* ; which the plaintiff's attorney refused to do. It further appears, that, after Slowman's partner, Baker, had entered, and the plaintiff had

(a) Vide Com. Dig. Execution (C. 5) ; Kerbey v. Denby, 1 M. & W. 336.

tendered to Baker, under protest, the amount demanded, Baker declined to accept the amount of the levy, or to withdraw, without the assent of Slowman; and Slowman, upon application to him, offered to withdraw the men in possession, provided he had a present of 20*l.*; and, on the Monday, Slowman received the amount, tendered to him also under protest, and withdrew the men.

We think these facts were evidence proper to be submitted to the jury upon the points insisted upon on the part of the plaintiff, viz. that Slowman assumed and took upon himself the control and direction of the execution of the warrant, and authorized the illegal mode of execution that was adopted. And we think there is no sufficient ground for saying that the conclusion to *which the jury came was wrong: and, therefore, as the court is of opinion that the several grounds upon which [332 the rule was obtained, have failed, the rule must be discharged.

Rule discharged.(a)

(a) Vide *Reynolds v. Newton*, 1 Gale & D. 153; *Aldridge v. Stanford*, 3 M. & G. 409.

END OF TRINITY VACATION.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,

IN
Michaelmas Term,

IN THE
THIRTEENTH YEAR OF THE REIGN OF VICTORIA. 1849.

The judges who usually sat *in banco* during this term, were—

WILDE, C. J.	V. WILLIAMS, J.
MAULE, J.	TALFOURD, J.

MEMORANDA.

THE Hon. Sir THOMAS COLTMAN, one of the judges of the Court of Common Pleas, died on the 11th of July last.

On the 28th of the same month, Mr. Serjt. *Talfourd* was appointed one of the judges of the Court of Common Pleas, in the room of the late Mr. Justice COLTMAN. He shortly afterwards received the honour of knighthood, and took his seat on the first day of this term.

*334] *COX and Another *v.* BEAVAN. Nov. 3.

In proceeding to outlawry after final judgment, the writ of *allocatur exigent* is properly tested on the day of the return of the *exigi facias*, and need not bear teste upon the *quarto die post*.

THE plaintiffs having obtained judgment against the defendant, issued a *ca. sa.* against him on the 10th of November, 1848, returnable on the 21st of November.

A writ of *exigi facias* was afterwards issued, tested the 24th of November, and returnable on the 11th of January, 1849. The *exigi facias* was filed on the 27th of January, and on that day a writ of *allocatur exigent* issued, bearing teste the 11th.

Prideaux now moved for a rule to show cause why the writ of *allocatur exigent* and subsequent proceedings should not be set aside for irregularity, with costs, on the ground that it was improperly tested on the return day of the *exigi facias*, instead of on the *quarto die post*. In Tidd's Practice, it is laid down, (a) that, "where the plaintiff means to proceed to outlawry, the *capias* should be tested on the *quarto die post* of the return of the original, the *alias* on the *quarto die post* of the return of the *capias*, and the *pluries* on the *quarto die post* of the return of the *alias*; and there must be fifteen days at least between the teste and return of each writ;" and that the writ of *exigi facias* "should be tested on the *quarto die post* of the return of the *pluries capias* before, or of the *capias* after judgment." The practice is similarly laid down in 3 Bl. Comm. 288. And this view seems to receive confirmation from the 5th and 6th sections of the uniformity-of-process act, *2 W. 4, c. 89. (b) In *Taylor v. Waters*, 2 B. & C. 858, 3 D. & R. 575, [*385 the *exigent* was returnable on the 17th of May, and the *allocatur exigent*, which was issued on the 30th of May, was tested on the *quarto die post*, which was the last day of Easter term. [V. WILLIAMS, J. The form (c) of the **allocatur exigent* given by Mr. Tidd, is, "We command you, that, allowing those ——— county courts (or, if in London, [*886 "those ——— hustings") at which C. D. was demanded, and did not

(a) 9th edit. pp. 129, 132.

(b) The 5th section enacts, that, "upon the return of *non est inventus* as to any defendant against whom such writ of *capias* shall have been issued,* and also upon the return of *non est inventus* and *nulla bona* as to any defendant against whom such writ of *distingas* as hereinbefore mentioned shall have issued, whether such writ of *capias* or *distingas* shall have issued against such defendant only, or against such defendant and any other person or persons, it shall be lawful, until otherwise provided for, to proceed to outlaw or waive such defendant by writs of *exigi facias* and proclamation, and otherwise, in such and the same manner as may now be lawfully done upon the return of *non est inventus*, to a *pluries* writ of *capias ad respondendum* issued after an original writ: Provided always that every such writ of *exigent*, proclamation, and other writ subsequent to the writ of *capias* or *distingas*, shall be made returnable on a day certain in term; and every such first writ of *exigent* and proclamation shall bear teste on the day of the return of the writ of *capias* or *distingas*, whether such writ be returned in term or in vacation; and every subsequent writ of *exigent* and proclamation shall bear teste on the day of the return of the next preceding writ; and no such writ of *capias* or *distingas* shall be sufficient for the purpose of outlawry or waiver, if the same be returned within less than fifteen days after the delivery thereof to the sheriff or other officer to whom the same shall be directed."

And the 6th section enacts, that, "after judgment given in any action commenced by writ of summons or *cepas* under the authority of this act, proceedings to outlawry or waiver may be had and taken, and judgment of outlawry or waiver given in such manner and in such cases as may now be lawfully done after judgment in an action commenced by original writ: Provided always that every outlawry or waiver had under the authority of this act shall and may be vacated or set aside by writ of error, or motion, in like manner as outlawry or waiver founded on an original writ may now be vacated or set aside."

(c) Tidd's Forms, 8th edit. 44. And see Chitty's Forms, 6th edit. 531.

* Since the passing of the 1 & 2 Vict. c. 110, the only mode of proceeding to outlawry is upon the writ of *distingas*.

appear, as you have *this day* returned to Our justices at Westminster, you do cause the said C. D. to be further demanded," &c. MAULE, J. In *Stowell v. Lord Zouch*, Plowden, 871, which is cited in 2 Chitty's Archbold, (a) Dyer says: "that, if, upon the *exigent*, it is returned, that the party is *quarto exactus*, and that there is one county wanting, and upon this another writ issues *allocato comitatu*, this fifth county ought to be that which is next after the fourth, for, if it be not, but if the day of the fifth county is *the day of the return of the exigent*, or *is passed before the date of the second writ*, or if, upon other accident, the county at which he is outlawed be not the next after the fourth, it has been held by us in the Common Bench to be error; for, a time commenced ought to be continued without intermission." WILDE, C. J. The defendant is not bound to appear if only exacted at four courts or hustings. Your main argument, therefore, fails.] The direction at the end of the form in Tidd, to make the teste of the *allocatur exigent* "the day of the return of the *exigent*," is not supported by any authority: and there certainly is no reason why the *allocatur exigent* should in this respect be different from any of the other proceedings.

WILDE, C. J. It appears to me that the objection to the writ of *allocatur exigent* in this case, cannot be sustained. The only direct authority that has been referred to on the subject, is the form in Mr. Tidd's Appendix, to which my brother WILLIAMS called our attention, and which [1837] expressly shows that the teste of "the *allocatur exigent* is to be the day of the return of the *exigi facias*. I think that Mr. Tidd could hardly have been so mistaken as to introduce the formal allegation "as you have this day returned," &c., without some good foundation.

The rest of the court concurring,

Rule refused. (b)

(a) 8th edit. p. 1138.

(b) In proceedings by original writ, the *capias* not being returnable on a day certain, the first writ of *exigent* could not bear teste of a day earlier than that on which the court became seized of the proceedings, by the actual return of the *capias*,—that is, the *quarto die post*. But, inasmuch as the *exigi facias* was returnable on a day certain, the *allocatur exigent* might, and usually did, bear teste of the actual return day of the *exigi facias*.

HEGINBOTHAM v. THE EASTERN AND CONTINENTAL STEAM PACKET COMPANY. Nov. 5.

In case against the defendants for disturbing the plaintiff in his occupation of an hotel,—the defendants pleaded that they were a joint-stock company, registered pursuant to the 7 & 8 Vict. c. 110, for the purpose of establishing and carrying on a communication, by means of steamboats, between England and certain ports of France, being a purpose of great general and public utility and advantage; that it was necessary for them, for the purpose of carrying on the said communication, to construct and repair steamboats and other vessels, and the machinery thereof; that it was greatly for the public advantage that the said construction and repairs of the said steam and other vessels should be executed at some convenient place near to the port of F., because the same could be there done at less expense, and so the company would be enabled to charge the public lower rates or fares; that the premises where the alleged

nuisances were committed, were a convenient place near to F. for the purpose aforesaid; and that the noises, &c., complained of, were necessarily and unavoidably made in the execution of such repairs, &c.

The plaintiff replied, admitting that the defendants were a joint-stock company registered pursuant to the statute, *de injuriâ sua propriâ absque residuo causæ*; and added the similitter, and, on the 7th of July, delivered the issue, with notice of trial for the then next assises.

On the 17th of July, the defendants gave notice that they had struck out the similitter, and delivered a demurrer to the replication, on the ground that, the plea not consisting of mere matter of excuse, *de injuriâ* was inapplicable. On the 29th, a judge, on summons, set aside the demurrer as frivolous, and ordered that the issue delivered should stand, and the cause be tried accordingly. The cause was tried, and the plaintiff obtained a verdict:—
Held, that the order was properly made, and the trial regular.

THIS was an action upon the case. The declaration stated that the plaintiff, before and at the time of the committing of the grievances thereafter mentioned, *was and continued possessed of a messuage, &c., in the county of Kent, called The Royal George Hotel, and carried on the trade and business of an hotel-keeper; and that the defendants were possessed of certain workshops, buildings, and premises situate near the said messuage, &c., of the plaintiff: nevertheless, that the defendants, contriving and intending, &c., to interrupt, disturb, disquiet, and annoy the plaintiff and his family in the peaceable and quiet possession and occupation of the said messuage, &c., and in the exercise therein of his trade, &c., on the 20th of May, 1849, and on divers other days and times, &c., wrongfully, &c., made, and caused to be made, in and upon their said workshops, buildings, and premises, divers loud, heavy, jarring, stunning, hammering, and battering sounds and noises, to wit, in the working of iron, and in making and repairing divers iron boilers, funnels, and other iron vessels, instruments, and things, and continued, &c., for divers long spaces of time, and at unseasonable hours and times, to wit, throughout all the days aforesaid; and that, by means of the premises, the plaintiff and his family had been and were greatly disturbed and disquieted, incommoded, interrupted, and annoyed in the peaceable and quiet possession, use, occupation, and enjoyment of the said messuage, &c., and the said messuage, &c., of the plaintiff had been and were, by means of the several premises aforesaid, greatly lessened in value; and also that, by means of the several premises, the plaintiff, for and during all the time *aforesaid, had been greatly disturbed and interrupted in his said trade and business, and divers, to wit, two hundred, guests, who would otherwise have remained and resided in his said hotel, to his great profit, did, by reason of the said noises and sounds, quit and leave the same, and divers, to wit, two hundred, other persons who would have otherwise come to reside at his said hotel, to his great profit, did, by reason of the said noises and sounds, abstain from so coming to reside as aforesaid; and the plaintiff, by reason of the premises, and of the said noises and sounds, was prevented from carrying on and exercising his said trade and business in his said messuage, &c., in as beneficial and profitable a manner as he otherwise might and could have done, &c.

The defendants pleaded,—first, not guilty,—secondly, that the plaintiff was not possessed of the messuage, &c., in manner and form, &c.,—thirdly, that the defendants were not possessed of the said workshops, buildings, and premises, in manner and form, &c.,—fourthly, that, before and at the time, &c., the defendants were, and from thence hitherto had been, and still continued, a joint-stock company, registered pursuant to the provisions of a certain act of parliament made and passed in the eighth year of the reign of Her Majesty Queen Victoria, intituled ‘An act for the registration, incorporation, and regulation of joint-stock companies,’ and constituted and formed, under and according to the provisions of the said act, for the purpose of establishing and carrying on a convenient and efficient communication by means of steamboats between the several ports of the counties of Kent and Sussex, approached by a certain railway called The South-Eastern Railway, and, amongst others, the port of Folkstone, in the county of Kent aforesaid, and various ports on the continent of Europe, and, amongst others, the ports of Boulogne and Calais, in France, the said *purpose being of great general
 *840] and public utility and advantage: that, during all the said time in the introductory part of this plea mentioned, they had, according to the said purpose, carried on, and still did carry on, a convenient and efficient communication between the said several ports, by means of steamboats and other vessels used by the defendants for the conveyance and transmission, for reasonable hire and reward to the defendants at certain rates and fares charged and demanded by the defendants in that behalf, of passengers and goods to and from the said several ports, to the great advantage of the public: that, during all the time aforesaid, it became and was necessary for the defendants, for the purpose of carrying on the said communication, from time to time to construct divers steamboats and other vessels, and also to do and execute divers necessary repairs of the said steamboats and other vessels, and of the machinery belonging to, and connected with, the same: that, during all the said time, it was greatly for the public advantage that the said construction of the said steamboats and other vessels, and the said repairs of the same, should be carried on, done, and executed at some convenient place near to the port of Folkstone aforesaid, because the same respectively could be carried on, done, and executed at such place, at a much less expense to the defendants, to wit, at 5000*l.* less annual expense to the defendants, than would have been necessarily incurred by them in carrying on, doing, and executing the same respectively at a place not near to the said port of Folkstone aforesaid, and by reason thereof the defendants were enabled to charge and demand upon and from the public cheaper and less rates and fares for such conveyance and transmission of passengers and goods to and from the said several ports as thereinbefore
 *841] mentioned, to wit, to the amount of 5000*l.* annually less than they would otherwise necessarily *have charged and demanded as rea-

sonable rates and fares in that behalf: that the said workshops, buildings, and premises of the defendants in the declaration mentioned, were a convenient place near to the port of Folkstone for the carrying on and doing and executing of the construction of the said steamboats and other vessels, and of the said repairs of the same as aforesaid, and that there was no other place near to the port of Folkstone aforesaid equally convenient for the said purpose: that, during the said time in the introductory part of this plea mentioned, to wit, on, &c., and on other days from time to time as occasion required, they did, in the said workshops, buildings, and premises of the defendants in the declaration mentioned, construct divers, to wit, fifty steamboats and other vessels, and also there did and executed divers necessary repairs in and upon the same, and in and upon divers, to wit, one hundred other steamboats and other vessels of the defendants, to be used by the defendants for the said purpose thereinbefore mentioned, and for no other purpose, constructing, doing, and executing the same respectively in a reasonable and proper manner, and at reasonable and proper times and hours, to wit, during the day-time, making no unnecessary noise and disturbance, and, in so doing, did necessarily make the said loud, heavy, jarring, stunning, hammering, and battering sounds and noises in the declaration mentioned, the same being necessary and unavoidable, therein, and not in any unnecessary or unreasonable degree,—verification. There were other pleas, to which it is unnecessary more particularly to advert.

To the fourth plea the plaintiff replied, that, although true it was that the defendants were and continued a joint-stock company registered pursuant to the provisions of the said statute, and constituted and formed under and according to the provisions of the said act, as *in the [*342 said fourth plea in that behalf mentioned; yet that the defendants, of their own wrong, and without the residue of the cause by them in the said fourth plea alleged, committed the grievances in the declaration mentioned, in manner and form as in the declaration alleged,—concluding to the country.

The plaintiff's attorneys, having added a similiter, delivered the issue on the 18th of July, 1849, with a notice of trial for the next assizes at Maidstone. The defendants' attorneys, on the 17th, gave notice that they had struck out the similiter to the replications to the fourth, fifth, and last pleas, and demurred to the replication to the fourth plea, on the ground that, the plea not setting up mere matter of excuse for the committing of the grievances in the declaration mentioned, the replication *de injuriâ* was inappropriate. In the margin of the demurrer was the usual note,—“the grounds of demurrer are specially stated in the body of it.”

On the 18th of July, the plaintiff's attorneys took out a summons before Lord DENMAN, calling upon the defendants to show cause why the demurrer should not be set aside, on the ground that no sufficient state-

ment appeared in the demurrer, or the margin thereof, of any matter of law intended to be argued, and that such demurrer and statement were frivolous; and why the issue already delivered, and notice of trial, should not stand. And on the 19th, his lordship made an order in the terms of the summons.

On the same day (the 19th) the defendants' attorneys took out a summons to rescind that order, which was attended before Lord DENMAN on the following day,—when his lordship, conceiving the demurrer to be frivolous, dismissed the summons: whereupon the defendants' attorneys gave notice to the plaintiff's attorneys, that, if the plaintiff proceeded to trial, he would do so at his peril, and that the defendants would move the court in *343] the ensuing term to set aside the order of the 19th of July and any trial or other proceedings which might be had or taken under or in pursuance thereof, and to restore the defendants' demurrer.

The cause was taken as undefended, and a verdict found for the plaintiff, with 15*l.* damages.

WILLES now moved for a rule nisi to set aside the order of Lord DENMAN, and all subsequent proceedings. Independently of the question whether the demurrer was frivolous or not, the trial was irregular,—there having been no issue joined with the assent of both parties. The learned judge had no power to fetter the defendants in the way he has assumed to do: the proper course would have been, to enable the plaintiff to sign judgment, if he thought the demurrer frivolous. The demurrer, however, was not frivolous. The objection to the replication appears to have been, that the general replication *de injuriâ* was inapplicable to a plea which did not set up mere matter of excuse, but amounted to a denial (though possibly an argumentative denial) of the matters alleged in the declaration. [MAULE, J. And therefore was a plea that should have been demurred to, as affording no answer to the action at all. *The King v. Russell*, 6 B. & C. 566, 9 D. & R. 566.]

WILDE, C. J. It strikes me that the order of Lord DENMAN was, under the circumstances, quite correct. When the issue was delivered, it was competent to the defendants to strike out the similiter. They do so, and then demur to the replication to the fourth plea. The plaintiff, thinking the demurrer frivolous, applies to Lord DENMAN to strike out the demurrer, and leave the record as it stood before. The defendants *344] insist before the learned judge upon their right to retain their demurrer. He thinks they are not entitled to it, and makes an order accordingly, directing the trial to proceed upon the issue as delivered. The defendants then give a written notice, that, if the plaintiff proceeds to trial upon that order, they will move to set it aside, and to restore the demurrer. No offer was made of any judgment, as is now suggested (by way of after-thought) to have been the proper course: the judge and the plaintiff were entirely misled.

MAULE, J. I agree with my lord chief justice that there is no ground

for this application. I also agree that the demurrer was frivolous. The plea was a plea in excuse, (a) and not in denial,—setting up a reason, and a bad one, for doing that which was complained of in the declaration.

The rest of the court concurring,

Rule refused. (b)

(a) See *Crogate's case*, 8 Co. Rep. 66, 1 Smith's Leading Cases, 53.

(b) The plea states that the operations complained of, enabled the defendants to charge and demand from the public less rates and fares; but, whether any benefit had arisen, or was likely to arise, to the public, does not distinctly appear.

*WESTROPP and Others v. SOLOMON. Nov. 7. [*346]

On the 10th of March, 1847, A. employed B., a share-broker and member of the London Stock-Exchange, to sell for him certain documents which purported to be scrip or certificates, each for fifty shares, in a projected railway company. On the 27th B. sold these certificates to C., and handed over the proceeds to A. The certificates being subsequently found to be forged, B. was, on the 11th of May, called upon and obliged to pay (pursuant to a resolution of a committee of the Stock-Exchange) to C. a certain agreed value as for genuine certificates of that company, and which considerably exceeded the price for which he had sold the spurious certificates.

In an action by B. against A. to recover the sum so paid by him to C., the declaration contained a special count averring a promise by A. that the certificates were genuine, and a count for money paid. Upon the latter count, A. paid into court the sum he had received on the original sale, with interest:—

Held, that B. was not entitled to recover upon the special count, there being no promise, express or implied, that the certificates were genuine; and that, under the count for money paid, B. was only entitled to recover the amount actually paid by him to A.

Held, also, that the resolution of the committee of the Stock-Exchange, made after the transaction was completed, however it might bind the members of that body, could not affect A.

THIS was an action of assumpsit. The first count of the declaration stated that the plaintiffs, before and during all the times thereafter mentioned, had carried on, and still did carry on, the trade or business of share-brokers, in co-partnership together; and that thereupon, and before the commencement of the suit, to wit, on the 12th of May, 1846, in consideration that the plaintiffs, as such brokers, at the request of the defendant, would for certain reasonable reward to be therefore paid to the plaintiffs as brokers as aforesaid by the defendant in that behalf, sell for the defendant and on his account, certain, to wit, 5000, scrip or certificates for shares, purporting to be scrip or certificates for shares in a certain company, to wit, "The Buckinghamshire, Oxford, and Bletchley Junction Railway Company," at the best market price to be then obtained for the same, the defendant then promised the plaintiffs, as such brokers as aforesaid, that the said scrip or certificates for shares were genuine scrip or certificates for shares in that company, and issued by [*346] them the said company: that the plaintiffs, as brokers as aforesaid, confiding in the promise of the defendant, afterwards, to wit, on the day and year last aforesaid, received and took from the defendant the said scrip or certificates for shares, purporting as aforesaid, and, as brokers as aforesaid, afterwards, to wit, on the day and year aforesaid,

sold and disposed of the same as genuine scrip or certificates for shares in the said company, and issued by the said company, to divers persons, at certain reasonable, and the best market prices to be then obtained for the same, for and on account of the defendant, to wit, the market price, amounting in the whole to 492*l.* 10*s.* 6*d.*, paid by the said purchasers thereof to the plaintiffs as such brokers, and which last-mentioned sum of money the plaintiffs thereupon then, to wit, on the day and year last aforesaid, paid over to the defendant,—being the purchase-money on the sale of the said scrip or certificates for shares so delivered by the defendant to the plaintiffs: yet that the defendant did not perform or regard his said promise, but then deceived and defrauded the plaintiffs, in this, to wit, that the said scrip or certificates for shares purporting to be such in the said company, were not, nor were any of them, genuine scrip or certificates for shares in the said company, and issued by the said railway company; but that, on the contrary thereof, the same, and every of them, were forged, false, spurious, and invalid scrip or certificates for shares, and of no use, interest, or value in the said company, and of no use, interest, or value whatever to the said purchasers of the same as aforesaid. The count then proceeded to state, that afterwards, and before the commencement of this suit, to wit, on the 1st of May, 1846, the said purchasers of the said false scrip from the plaintiffs, as brokers as aforesaid, as genuine as aforesaid, ascertained, as the fact was and is, that

*347] the said scrip or certificates for shares delivered by the defendant to the plaintiffs, as brokers as aforesaid, were and are forged, false, spurious, and invalid scrip or certificates for shares in the said company, and were not, nor were any one of them, issued by the said company, or by their authority; and that afterwards, to wit, on the day and year last aforesaid, the said purchasers of the same from the plaintiffs, as brokers as aforesaid, called on the plaintiffs, as such brokers as aforesaid, according to the law and usage in that behalf, to repay to them the said sums of money or prices aforesaid, amounting, to wit, to 492*l.* 10*s.* 6*d.*, together with certain large damages which they then claimed and demanded of and from the plaintiffs, as such brokers, and which the said purchasers had incurred and lost by reason of the said premises, and together with certain large damages which they then claimed and demanded of and from the plaintiffs, by reason of the premises aforesaid, for divers large sums and moneys which they the said purchasers had lost and would have obtained and gained, on the rise of the market price and value of genuine scrip or certificates for shares in the said company, issued by them the said company, amounting to a large sum, to wit, 1300*l.*, and which the plaintiffs were then forced and obliged to pay to the said purchasers, by reason of the said scrip or certificates turning out, as the fact was and is, false and spurious as aforesaid, according to law and usage in that behalf: and that the moneys so paid by them to the said purchasers were less than were required or were necessary or

sufficient to enable the said purchasers, or the plaintiffs, to replace to them the purchasers genuine scrip or certificates for shares in the said company, and issued by the said railway company, by purchasing equal numbers respectively of genuine scrip or certificates for shares, at such prices as it was then possible for them respectively to purchase the same.

*The declaration also contained a count for money paid, money had and received, and interest, and a count for money due upon [*348 an account stated.

The defendant pleaded,—first, to the first count, non assumpsit,—secondly, to the same count, that the said scrip or certificates for shares were genuine scrip or certificates for shares in the said company, and were issued by the said company; concluding also to the country,—thirdly, as to the causes of action in the second, third, and fourth counts mentioned, so far as they related to the said sum of 492*l.* 10*s.* 6*d.*, parcel, &c., that the plaintiffs ought not further to maintain their action in respect thereof, because the defendant brought into court 492*l.* 10*s.* 6*d.* ready to be paid to the plaintiffs, and the defendant said that the plaintiffs had not sustained damages to a greater amount than the said sum of 492*l.* 10*s.* 6*d.* in respect of the causes of action in the introductory part of that plea mentioned; verification, &c.,—fourthly, as to the residue of the causes of action in the second, third, and fourth counts mentioned, and not before pleaded to, non assumpsit.

The plaintiffs joined issue on the first, second, and fourth pleas; and, as to the third, replied by taking out of court the 492*l.* 10*s.* 6*d.*, in satisfaction and discharge of the causes of action in the second, third, and fourth counts respectively mentioned, so far as they related to that sum.

The cause came on for trial before WILDE, C. J., at the sittings in London after Hilary term, 1847, when a verdict was entered for the plaintiffs for 1800*l.*, subject to the opinion of the court upon the following case:—

The plaintiffs are stock and share-brokers, and members of the Stock-Exchange in London. The defendant is a bill-discounter in London: he is not a member of the Stock-Exchange.

On the 9th of March, 1846, a person applied to the *defendant, requesting him to make an advance of money by way of [*349 loan, upon the security of certain instruments purporting to be certificates of certain shares issued by The Buckinghamshire, Oxford, and Bletchley Junction Railway Company, and which were in the form set out at the end of the case,—each certificate purporting to relate to fifty shares.

On the 10th of March, 1846, the defendant took one of the instruments so offered as the security for the advance, to the plaintiff's office, and inquired of Melhado, one of the plaintiffs, if the instrument was good. Mr. Melhado said it was good, but to satisfy the defendant he would go into the market, and inquire if it was good. He did so, and returned and

said "it is good—it is all right;" or, as the witness believed the words were, "it is all right."

The defendant, after receiving this information, on the same day, made the required advance upon the security of the said certificates,—being the same as those sold by the plaintiffs for the defendant, as hereinafter mentioned.

On the 27th of March, 1846, the defendant employed the plaintiffs to sell for him *the* ten certificates upon which the defendant had made the advance of money under the circumstances before mentioned; and the defendant delivered the certificates to the plaintiff for that purpose.

The plaintiffs sold the ten certificates according to the defendant's orders, and paid him the balance of the proceeds of the sales, after deducting the commission payable in respect of the sale.

The gross proceeds were,	£487 10 0
Commission deducted,	15 12 6
		<hr/>
Net proceeds paid by plaintiffs to defendant,	£471 17 6
		<hr/>

*350] *A part of the certificates, that is to say, four certificates, were sold by the plaintiffs to Grisewood & Co., three to John Jones, and one to J. Starling, who were all members of the Stock-Exchange; and the sales were made to them in the Stock-Exchange. Other part of the said certificates, that is to say, two, were sold to a person of the name of Miles, who was not a member of the Stock-Exchange; and the sale was not made to him in the Stock-Exchange.

After the sales, suspicion arose in the share-market, that forged certificates purporting to refer to shares issued by the before-mentioned company, were in circulation; and that suspicion was followed by an exhibition at the office of the company of numerous certificates: and the ten certificates sold by the plaintiffs as above stated, among many others, were found to be forgeries.

In consequence of the discovery of the forgeries, a committee was appointed by the subscribers of the Stock-Exchange, to deliberate and determine what was proper to be done among the parties who had had transactions and dealings in that establishment, relating to such forged certificates: and that committee adopted and published the following resolution upon the subject:—

"That the holders of shares of The Buckinghamshire Railway Company, which have been declared by the company to be spurious, shall have the right to demand of the sellers thereof genuine shares in exchange, or, until such can be procured, to pay for the same at the rate of 2*l.* 12*s.* per share (10*s.* premium); such amount to be retained until genuine shares are delivered."

By the regulations and practice of the Stock-Exchange, all brokers,

although they may, in fact, be dealing for others as principals, are deemed to be principals, and liable as such ; and are required to meet the responsibilities they so incur, under pain of expulsion.

*The rules and regulations of the Stock-Exchange profess to apply only to members of the establishment, and to transactions taking place within such establishment. [*351

A copy of the rules and regulations accompanies this case, and is signed by the respective attorneys ; and they may be referred to by either side, in the argument, so far as the court shall be of opinion that either party is entitled by law to use them against the other, but no further,—their being produced to the court by consent, not to be deemed to import a consent or admission entitling either party to use or refer to them, except so far as by law they may.

After the discovery of the forgeries, the plaintiffs were called upon by the respective purchasers, to refund the purchase-money, or to indemnify them from loss : whereupon the plaintiffs called upon the defendant, as their principal, for instructions and indemnity ; and the following correspondence took place between them :—

London, 9th May, 1846.

“LEON SOLOMON, Esq., *Jermyn St.*

“Dear Sir,—In addition to our personal communications with you upon the subject, we deem it necessary to inform you that 500 scrip shares in the Buckinghamshire Railway Company, which you delivered to us for sale on the 27th of March, numbered as at foot, and which we passed into the market, have been found to be spurious documents, not issued from the office of the company ; and that they will be brought back to us with a claim from the purchasers for authentic scrip certificates, which we shall immediately be compelled to meet on your account, by the delivery of good and undoubted documents. We would strongly urge you, therefore, at once to give us authority to purchase on your account the number of proper shares, while the *price of them continues low ; as, otherwise, we may be forced to do so at a high price, the whole loss of which falls upon yourself, as, of course, we look to you, from whom we received the spurious documents, to bear us harmless in the transaction. We earnestly recommend your immediate attention to this matter, as the premium on Buckinghamshire shares is hourly on the increase.

“Yours faithfully,

(Signed)

“WESTROPP, PRINSEPP, & MELHADO.”

“No. 22,951 @ 23,000	- -	50.
40,401 @ 40,450	- -	50.
22,901 @ 22,950	- -	50.
40,101 @ 40,150	- -	50.
22,851 @ 22,900	- -	50.
40,051 @ 40,100	- -	50.

22,601 @ 22,650 - - 50.
 40,701 @ 40,750 - - 50.
 40,501 @ 40,550 - - 50.
 22,551 @ 22,600 - - 50."

No answer was sent to that letter: and, on the 11th of May, 1846, the plaintiffs delivered to the defendant the following letter:—

"75 Old Broad St., 11 May, 1846.

"LEON SOLOMON, Esq., 66 *Jermyn St.*

"Dear Sir,—With reference to our letter of Saturday's date, we have now to inform you that we have been called upon by the parties who received your Buckinghamshire scrip from us, to deliver to them good and authentic scrip in lieu of those which have been proved at the office of the company to be spurious. We have, therefore, to inform you that it has become absolutely necessary for you to authorize us to-morrow to purchase such shares on your account, to enable us to deliver them. And we request you will put us in funds for the purpose, as, by the rules *353] of our market, we shall *not be able to put off the claim. We must particularly request that you will favour us with your answer before twelve o'clock,—in fact, the earlier the better,—as it is possible the market may be more unfavourable for your interests than at present. They were done to-day at $\frac{1}{4}$ premium.

"Yours faithfully,

(Signed) "WESTROPP, PRINSEPP, & MELHADO."

The defendant refused to give any instructions or indemnity; and the plaintiffs afterwards, yielding to the demands made upon them by the respective purchasers of such forged certificates, paid certain sums of money by way of damage or compensation to such respective purchasers, such payments being calculated and adjusted upon the principle laid down in the resolution of the Stock-Exchange committee; and which payments amounted in the whole to the sum of 1300*l.*, that is to say,

To Grisewood & Co., who were, as before stated, members of the Stock-Exchange, and in respect of sales made to them in the Stock-Exchange	-	-	-	520	0	0
To Mr. John Jones, like member of the Stock-Exchange				260	0	0
To J. Starling, - do	-	do.	-	260	0	0
To Mr. Miles, the sum of	-	-	-	260	0	0

It is to be taken as an undoubted fact, that both the plaintiffs and the defendant acted throughout, up to the time of the forgeries being discovered by inquiry at the office of the company long after the sales, in the belief that the certificates referred to, were genuine available certificates, duly issued by the company mentioned therein.

*The forgeries were so well executed as to excite no suspicion, *354] and passed currently in the market with genuine scrip.

The defendant has paid into court the sum of 492*l.* 10*s.* 6*d.*

The instruments referred to were in the form following; and each purported to apply to fifty shares:—

"1845. "BUCKINGHAMSHIRE RAILWAY,
"Scrip. "(and Oxford and Bletchley Junction).

"*Provisionally registered.*

"Capital £2,250,000, in shares of £20 each.

"Deposit, £2 2 0 per share

"No. 22,601 to 22,650. The holder of this voucher is entitled to

"FIFTY SHARES

in the above undertaking, he having signed the subscribers' agreement and parliamentary contract, paid the deposit as above, and agreed to pay all calls in respect of the said shares.

"By order of the provisional committee of management,

"W. HARDING, Secretary."

The prices of genuine scrip on the 27th of March, 1846, and thence up to the 16th of May following, were as follows,—£20 per share, 2*l.* 2*s.* paid:—

"March 27. 1*l.* to 1*l.* 5*s.* discount.

"28. 1*l.* to 17*s.* 6*d.* discount, and so continued to the 1st of April.

"April 1. 1*l.* 2*s.* 6*d.* to 15*s.* discount.

"From April 1 to April 24, the price fluctuated from 1*l.* 5*s.* to 15*s.* discount.

"From April 24 to April 28, nothing appears to have been done in them.

"April 28. Prices quoted at from 12*s.* 6*d.* to 15*s.* discount.

"29. Prices quoted at from 12*s.* 6*d.* to 5*s.* discount.

"30. At par.

"31. At par. 1*s.* to 5*s.* discount.

"May 2. At par, to 2*s.* 6*d.* discount.

"4. At par, to 5*s.* premium.

"May 4 to 8. Prices fluctuated between par and 7*s.* 6*d.* premium.

"8. From 1*l.* 2*s.* 6*d.* to 10*s.* premium.

"9. From 1*l.* to 12*s.* 6*d.* premium.

"11. From 17*s.* 6*d.* to 10*s.* premium.

"12. At 10*s.* premium.

"May 13. From 10*s.* to 5*s.* premium.

"14, 15. At 10*s.* premium.

"16. From 5*s.* to 10*s.* premium: and they went gradually down to discount."

The court is to adopt such inferences of fact from the statements in the case, as it may think a jury ought or might properly have drawn.

The question for the opinion of the court is,—whether the plaintiffs

are entitled to recover against the defendant any, and, if any, what sum of money exceeding the amount paid into court. If the court shall be of opinion that the plaintiffs are entitled to recover, then a verdict is to be entered for the plaintiffs for such sum, on such counts, and on such issues, as the court shall direct. If the court shall think the plaintiffs are not entitled to recover any sum beyond the amount paid into court, then a nonsuit to be entered.

Hoggins, for the plaintiffs. (a) Under the circumstances stated in this case, the plaintiffs are entitled to *call upon the defendant for a *356] full indemnity. The case, in effect, resolves itself into one of principal and agent. The general rule of law is thus laid down by Dr. Story: (b) "If an agent has, without his own default, incurred losses or damages, in the course of transacting the business of his agency, or in following the instructions of his principal, he will be entitled to full compensation therefor. (c) Thus, for example, if an agent, in consequence of a deception practised upon him by his principal, and in pursuance of orders, innocently makes a false representation of the quality of the goods of his principal, and he is compelled to pay damages to a purchaser on account thereof, he will be entitled to a full remuneration from the principal. (d) So, if an agent has innocently, and without any notice of an adverse title, converted the property of a third person, under the direction or authority of his principal, claiming it as owner, and a recovery is subsequently had against him therefor by such third person, he will be entitled to a reimbursement from his principal. (e) Indeed, it may be stated, as a general *357] principle of law, that an agent, who commits a trespass, or other wrong, to the property of a third person, by the direction of his principal, if at the time he has no knowledge or suspicion that it is such a trespass or wrong, but acts *bona fide*, will be entitled to a reimbursement and contribution from his principal for all the damages which he sustains thereby. (g) For, although the general doctrine of the common

(a) The points marked for argument on the part of the plaintiffs, were,—“That, having sold for the defendant, at his request, and as his brokers, the scrip or certificates for shares purporting to be scrip or certificates for shares in The Buckinghamshire, Oxford, and Bletchley Junction Railway, which turned out to be forgeries, and of no value, they were entitled to recover from the defendant the proceeds of such sale, which they paid to him (492*l*. 10*s*. 6*d*.), with interest thereon from the time of such payment, and also damages amounting to 1800*l*., which the plaintiffs had been forced to pay, and had paid, to the purchasers of the said scrip or certificates from the plaintiffs, as brokers for the defendant.”

(b) Story on Agency, 3d edit. p. 435.

(c) Citing *Ramsay v. Gardner*, 11 Johns. R. 439; *Power v. The Trustees of Newburgh*, 19 Johns. R. 284; *D'Arcy v. Lisle*, 5 Binn. R. 441; *Steeking v. Sage*, 1 Day, Conn. R. 292; *Hill v. Packard*, 5 Wend. R. 375; *Rogers v. Kneeland*, 10 Wend. R. 219.

(d) Citing Paley on Agency (by Lloyd), 152, 301; *Southern v. How*, *Bridgman*, 125; 2 Molloy *de Jur. Marit.* b. 6, ch. 3, § 6, pp. 329, 330; *Oru. Jac.* 468.

(e) Citing Paley on Agency (by Lloyd), 152, 301; *Adamsen v. Jarvis*, 4 Bing. 66, 12 J. B. Moore, 241; *Affaire v. Ouland*, 2 Johns. Cas. 54; *Coventry v. Barton*, 17 Johns. R. 142; *Avery v. Halsey*, 120 Mass. R. 174.

(g) *Adamsen v. Jarvis*, 4 Bing. 66, 12 J. B. Moore, 241; *Fletcher v. Heston*, *Hutton*, R. 55; *Powell v. The Trustees of Newburgh*, 19 Johns. R. 284; *Avery v. Halsey*, 14 Pick. R. 114; *Coventry v. Barton*, 17 Johns. R. 142.

law is, that there can be no reimbursement or contribution among wrongdoers, whether they are principals or are agents, yet that doctrine is to be received with the qualification, that the parties know, at the time, that it is a wrong. (a) And, in all these cases, there is no difference, whether there be a promise of indemnity or not; for the law will not enforce a contract of indemnity against a known and meditated wrong; and, on the other hand, where the agent acts innocently, and without notice of the wrong, the law will imply a promise on the part of the principal to indemnify him." In *Brittain v. Lloyd*, 14 M. & W. 762, it was held that an action is maintainable in every case in which the plaintiff has paid money to a third party, at the request, *express or implied, of the defendant, with an undertaking, express or implied, to repay it. [358

The rule which prevents contribution or indemnity as between tort-feasors, applies only where the act is of an *obviously* illegal character: *Betts v. Gibbins*, 2 Ad. & E. 57, 4 N. & M. 64. Here the plaintiffs were compelled, by the rules and regulations applicable to persons in their position, to refund the money to those who purchased the scrip of them; and there are several authorities which show, that, under these circumstances, they are entitled to call upon their principal for an indemnity, even though the principal be ignorant of the existence of the rules which bind the agent: *Sutton v. Tatham*, 10 Ad. & E. 27, 2 P. & D. 308; *Bayliffe v. Butterworth*, 1 Exch. 425; *Bayley v. Wilkins*, 7 Man. Gr. & S. 886. In *Sutton v. Tatham*, LITTLEDALE, J., says (10 A. & E. 80): "A person who employs a broker must be supposed to give him authority to act as other brokers do. It does not matter whether or not he himself is acquainted with the rules by which brokers are governed." So in *Bayliffe v. Butterworth*, PARKER, B., says: "I take it to be clear law, that, if there is, at a particular place, an established usage in the manner of dealing and making contracts, a person who is employed to deal or make a contract there has an implied authority to act in the usual way:" and ALDERSON, B., adds: "A person who deals in a particular market, must be taken to deal according to the custom of that market; and he who directs another to make a contract at a particular place, must be taken as intending that the contract may be made according to the usage of that place." And COLTMAN, J., in *Bayley v. Wilkins*, says: "A person who goes into the Stock-Exchange to buy shares, must be supposed to have a knowledge of *the usual course of business there, and of the law applicable to it." *Young v. Cole*, 3 N. C. 724, 4 Scott, 489, is precisely in [359 point: there, the plaintiff, a stock-broker, sold for the defendant four Guatemala bonds, and paid him the amount: the bonds, after they had

(a) *Merryweather v. Nixan*, 8 T. B. 186; *Adamson v. Jarvis*, 4 Bingh. 66, 12 J. B. Moore, 241. (The case of *Farebrother v. Anley*, 1 Campb. 343, seems overruled in its leading principle by that of *Adamson v. Jarvis*), 2 Liverm. on Agency, 316—318 (edit. 1818), 320, 324, 325; *Fletcher v. Haroot, Hutton*, R. 55; (*Battersey's case*) *Winch*, R. 48; *Humphreys v. Pratt*, 2 Dow & Clark, 238; *Betts v. Gibbins*, 2 Ad. & E. 57, 4 N. & M. 64; *D'Arcy v. Lisle*, 5 Binn. R. 441; *Powell v. The Trustees of Newburgh*, 19 Johns. R. 284; *Covenry v. Barton*, 17 Johns. R. 143; *Arery v. Halsey*, 14 Pick. 174.

been in the hands of the purchasers two days, were discovered not to be marketable, whereupon the plaintiff took them back, and reimbursed the purchaser: and it was held that the plaintiff was entitled to recover from the defendant, in an action for money had and received, the amount he had paid to the defendant. TINDAL, C. J., there says: "The money which the plaintiff delivered to the defendant was his own money, for, he had sold the bonds as a principal to Briant, and was subject to all the responsibilities of a principal. He delivered the money to the defendant on an understanding that the bonds he had received from the defendant were real Guatemala bonds, such as were saleable on the Stock-Exchange. It seems, therefore, that the consideration on which the plaintiff paid his money, has failed as completely as if the defendant had contracted to sell foreign gold coin, and had handed over counters instead. It is not a question of warranty; but whether the defendant has not delivered something which, though resembling the article contracted to be sold, is of no value." And BOSANQUET, J., says: "No consideration has been given for money received by the defendant: the bonds he delivered to the plaintiff were not Guatemala bonds, but, on the Stock-Exchange, worthless paper; and the payment made by the plaintiff to Briant was not voluntary. According to the principle established by *Child v. Morley*, 8 T. R. 610, the defendant was bound to reimburse the plaintiff what he

*360] was thus compelled to pay: for, it appeared to be the custom of the Stock-Exchange, that, in these cases, the broker is treated as principal, and liable to be expelled if he does not make good his differences." And COLTMAN, J., says: "The bonds which the plaintiff had sold at the defendant's request were not Guatemala bonds, in the sense of the Stock-Exchange. Therefore, even considering the plaintiff only as agent, when he received authority from the defendant to sell the bonds, he received an implied authority to act as all brokers do upon similar occasions, that is, to rescind the contract, if the article delivered turns out not to be the article sold." [MAULE, J. There, the money had been paid under a mistake.] That is precisely the case here. And there is no substantial distinction between the money paid as the value of the scrip, and the money paid as damages for the losses sustained by the sub-purchasers. In *Lamert v. Heath*, 15 M. & W. 486, the defendant, a share-broker, bought for the plaintiff scrip certificates, which were sold in the share-market at a premium, as "*Kentish Coast Railway scrip*," and were signed by the secretary of the railway company: the genuineness of this scrip was afterwards denied by the directors, who alleged that it was issued by the secretary without authority: in an action to recover back from the defendant the price paid to him by the plaintiff for this scrip, and for his commission, on the ground of the scrip not being genuine,—it was held that the proper question for the jury, was, whether what the defendant intended to buy was that which was sold in the market as "*Kentish Coast Railway scrip*." So here the

question is, was the scrip sold genuine scrip of The Buckinghamshire, Oxford, and Bletchley Junction Railway Company? [MAULE, J. That case is totally beside the present. The order there was, *to buy Kentish Coast Railway shares, generally: here, the order was, to [*361 sell the particular certificates, the party having the identical pieces of paper then in his hands.] It is submitted that the plaintiffs are entitled to recover, as well upon the special count as upon the count for money paid, upon the principle of indemnity. It may be urged, on the other side, that the plaintiffs, upon the facts stated in the case, warranted to the defendant that the scrip was genuine, and so induced him to advance money upon it. The inquiry, however, stated in the case, must be taken to have referred to the character and market value of the line, and not to the genuineness of the documents. The broker would have no peculiar means of knowledge on that subject. [MAULE, J. I should have thought that the proper way of ascertaining whether the scrip was genuine or not, was, to inquire at the office of the company.] The proper measure of damages will be, the market value of the shares at the time of the breach of contract: *Shaw v. Holland*, 15 M. & W. 136; *Tempest v. Kilner*, 3 Man. Gr. & S. 253. The contract was broken on the 11th of May, 1846, when the defendant refused to supply genuine scrip. At that date, the shares were at 10s. premium, which the plaintiffs have been compelled to pay: and to that extent they are clearly entitled to call upon the defendant for an indemnity.

Cowling, for the defendant.(a) The defendant having repaid the plaintiffs the amount he received for the *certificates in question, [*362 and interest, is liable no further; and consequently the plaintiffs must be nonsuited. It is a fallacy to treat this as a case of principal and agent. Suppose the defendant had himself sold the scrip to the several purchasers,—apart from the rules of the Stock-Exchange,—what liability would he have incurred? Clearly none, beyond the liability to refund the sum he had received. This is not a sale of shares generally, or of shares to be delivered at a future time: it is a sale of a specific article, which both parties at the time conceived to be genuine scrip. It turned out that they were forged. The sale took place under a mistake: the result is, that the vendees have to return the shares, and the vendor the money. This is very like the well-known case of *Jones v. Ryde*, 5 Taunt. 488, 1 Marsh. 157, where it was held, that a person who discounts a forged navy-bill,(b) or who receives forged bank-notes in payment, from another, who passes them without knowledge of the forgery,

(a) The points marked for argument on the part of the defendant were,—“That, as to the first count, he was entitled to the verdict, there being no proof of the agreement declared on, and particularly of the alleged promise: that, if not, the verdict should be reduced to nominal damages, because the rules of the Stock-Exchange, or at least those relied on by the plaintiffs, were not admissible against him, and because the breach of promise occurred at the time of the sales by the plaintiffs: and, as to the last issue, that the verdict should be for the defendant, the plaintiffs having been paid all the defendant received from them.”

(b) Or *viatualling-bill*.—*Bruce v. Bruce*, 5 Taunt. 495, n., 1 Marsh. 165.

may recover back the money, as money had and received to his use upon failure of the consideration. "The defendant," said GRAY, C. J., "has put off this instrument as a navy-bill of a certain description; it turns out not to be a navy-bill of that amount,(a) and therefore the money must be recovered back. Both parties were mistaken in the view they had of this navy-bill; the one, in representing it to be a navy-bill of this description; the other, in taking it to be such. Upon its afterwards turning out that the bill was to a certain extent a forgery, we think he who took the money ought to refund it, to the extent to which

*863] the bill is invalid. A case somewhat similar very frequently occurs in practice, on which I should not rely as governing the law, but that it is said by my brother *Lens* to be sanctioned on the authority of a case so decided at nisi prius by MANSFIELD, C. J., viz. where forged bank-notes are taken. The party negotiating them, is not, and does not profess to be, answerable that the Bank of England shall pay the notes; but he is answerable for the bills being such as they purport to be." The law is in all cases reluctant to raise implied promises: *Com. Dig. Covenant* (A. 2). When a man sells a horse, no warranty is implied, even that it is his own horse, unless he so represents it at the time. This question was recently very much discussed in the Court of Exchequer, in *Morley v. Attenborough*, 3 Exch. 500, where it was held that there is no implied warranty of title, in the contract of sale of a personal chattel; and that, in the absence of fraud, a vendor is not liable for a defect of title, unless there be an express warranty, or an equivalent to it, by declaration or conduct. Here, the sale was a sale of the specific documents, which were handed to the plaintiffs at the time. [MAULE, J. A sale of ten scrip or certificates, at large, would import a contract to deliver genuine scrip.] Exactly so. In *Kent's Commentaries*, Vol. II. p. 468, it is said: "If the subject-matter of sale be in existence, and only constructively in the possession of the seller, as, by being in the possession of his agent or carrier abroad, it is nevertheless a sale, though a conditional or imperfect one, depending on the future actual delivery.(b) But, if the article intended to be sold has no existence, there can be no contract of sale. Thus, if A. sells his horse to B., and it turns out that

*864] the horse was dead at the time, though the fact was unknown to the parties, the contract is necessarily void. So, if A., at New York, sells to B. his house and lot in Albany, and the house should happen to have been destroyed by fire at the time, and the parties equally ignorant of the fact, the foundation of the contract fails, provided the house, and not the ground on which it stood, was the essential inducement to the purchase."(c) If that be so, where the party himself is the seller, how does the case differ, because the sale is effected through a broker?

(a) The sum had been fraudulently altered after the issuing of the bill.

(b) Citing *Boyd v. Siffkin*, 2 Campb. 326; *Withers v. Lyss*, 4 Campb. 337.

(c) Citing *Pothier Contr. de Vente*, n. 4; *Hitchcock v. Giddings*, 4 Price, 135, *Daniel's Exch. R. 1*; *Story's Com. on Equity Jurisprudence*, 157; *Allen v. Hammond*, 11 *Peters's U. S. Rep.* 68.

It cannot be inferred that the defendant gave the brokers any authority to warrant the shares genuine. Then, do the rules and regulations of the Stock-Exchange impose upon the principal a liability he would not otherwise have incurred? The only rule set out in the case, is one which declares that brokers are liable *inter se* as principals. That merely places the plaintiffs in the same position as the defendant would have been in if he had sold the shares himself. [MAULE, J. It may be that the rules of the Stock-Exchange apply to sales at large, and not to sales of specific shares. In that case, it may be a wise and just regulation. I cannot help thinking that it is the common course to sell in that general way.] No rule is pointed out that at all affects this case: indeed, the circumstance of a committee of inquiry having been appointed, shows that there was no existing rule applicable to it. [MAULE, J. The decision of the committee was after the date of the contract. How could the defendant be bound by any resolution come to under such circumstances? Haggins. Every person who becomes a member of the Stock-Exchange signs an undertaking to be bound by any rules *thereafter to be made. [*365 MAULE, J. That does not show that he is to be bound by the decision of a committee to be appointed to investigate and decide on a particular case.] It may be conceded,—according to the authority of *Button v. Tatham*, *Bayliffe v. Butterworth*, and *Bayley v. Wilkins*, that, if there be any rule of the Stock-Exchange which pledges the broker to the genuineness of scrip sold by him, the principal is bound thereby. But this case is distinguishable. And, assuming that the rules do apply here, they can only apply to such of the dealings as took place on the Stock-Exchange.

As to the first count,—there is no such contract as therein alleged. The plaintiffs are merely stated to be share-brokers; nothing is said about the Stock-Exchange, or its rules. The consideration is, that the plaintiffs will sell for the defendant certain scrip or certificates for shares, purporting to be scrip or certificates for shares in a certain company,—not, that they will sell them *as genuine scrip*: and, if any promise that the scrip was genuine could be implied, it could only be implied from the authority to sell it as genuine. [MAULE, J. The declaration would not be bad on that account: the contract is executory.] A promise to indemnify is all that the law will imply, as between principal and agent: and that is not the promise here alleged. And as to the second count, the defendant clearly incurs no liability beyond the amount he has paid into court.

At all events, the damages can only be nominal. The question is, at what time the plaintiffs incurred a liability to their vendees. If there was any implied warranty, the breach of it took place at the very moment of the sale, and not at the time the discovery was made that the scrip was forged: *Howell v. Young*, 5 B. & C. 259, 8 D. & R. 14. *Shaw v. Holland* and *Tempest v. Kilner* are distinguishable: in both, [*366 the shares were to be delivered on a future day. In *Brittain v.*

Lloyd,—the authority of which is not disputed,—the money was paid by the auctioneer at least under the implied authority of his employer. In *Betts v. Gibbins*, there was an express authority. *Young v. Cole* is a distinct authority to show that the money paid into court in this case, is all that the plaintiffs could under any circumstances be entitled to recover.

Hoggins, in reply. *Sutton v. Tatham* shows that the plaintiffs are entitled to a full and complete indemnity. [MAULE, J. There, the employment was to sell shares, generally, to be delivered at a future day: it was a mere speculation on the price.] The case finds, that, by the regulations of the Stock-Exchange, all members dealing as brokers are liable as principals. All are bound to obey the rules, under pain of expulsion. The determination of the committee to whom the question as to this particular scrip was referred, though, perhaps, not legally binding, was a finding as to what was right and just between the parties. The contract here is one of indemnity: no breach, therefore, could arise until the plaintiffs were called upon to pay the damages sustained by their vendees, and the defendant refused to repay them; and that state of things arose on the 11th of May. In *Morley v. Attenborough*, the defendant sold the specific chattel: there was no warranty of title. In *Jones v. Ryde* and *Bruce v. Bruce*, the plaintiffs had sustained no damage beyond that which they sought to recover: those cases, therefore, are materially distinguishable from the present. All the authorities as to implied warranty, will be found collected in the two cases of *Morley v. Attenborough* and *Burnby v. Bollett*, 16 M. & W. 644. In *both *367] of them the ground of action failed, because there was neither warranty, express or implied, nor fraud.

MAULE, J.(a) This is an action of assumpsit: the declaration consists of a special count, and the common counts for money paid, &c. The special count in substance states, that the plaintiffs were share-brokers; that, in consideration that they would, as such brokers, sell for and on account of the defendant certain scrip or certificates for shares in a company called The Buckinghamshire, Oxford, and Bletchley Junction Railway Company, at the best market price of the day, the defendant promised them that the said scrip or certificates for shares were genuine scrip or certificates for shares in that company, and issued by the company; that the plaintiffs, confiding in that promise, sold the scrip as genuine, and paid the proceeds over to the defendant: it then alleges for breach, that the scrip was not genuine, but forged and spurious, and that the plaintiffs, as such brokers, were called upon by the purchasers thereof, according to the law and usage in that behalf, to repay them the money they paid for the same, and also certain damages for the loss of profit on the re-sale of the scrip. It appears that there was in the

(a) WILDER, C. J., and CRESSWELL, J., were sitting on criminal appeals, and TALFOURD, J., was at nisi prius.

market certain scrip which purported to be scrip or certificates for shares in The Buckinghamshire, Oxford, and Bletchley Junction Railway Company; that some of these documents were in the possession of the defendant, who had been asked to advance money upon them; that the defendant took one of these certificates to the plaintiffs' office, and inquired if it was good; that one of the plaintiffs said it was good, but, to satisfy the defendant, he would go into the market and inquire; *and that he did so, and returned and said that it was "good," [*368 or "all right." Now, there may be something equivocal in these expressions: it may be doubtful whether the plaintiff was desired to ask whether the scrip was genuine scrip such as it purported to be, or whether it was worth the sum, or more than the sum, paid upon it. But, whatever was meant, I do not think that material: for, I do not think our decision of the case ought to be at all influenced by what took place on that occasion. Both parties were innocent of any intention to deceive or mislead. The mere expression of an opinion, *bond fide* given at the defendant's request, certainly does not amount to a warranty of the genuineness of the scrip, or impose any liability upon the person giving it. After having received this information, the defendant advanced money upon the scrip. Then comes the important part of the case. On the 27th of March, 1846, the defendant employed the plaintiffs to sell for him the ten certificates upon which the defendant had made the advance of money under the circumstances before mentioned, and delivered them the scrip for that purpose. The case states that the plaintiffs sold the ten certificates, according to the defendant's orders, and paid him the balance of the proceeds, after deducting their commission. That is all that is said about the plaintiffs' employment, and the plaintiffs' performance of their duty in respect of that employment. The case then proceeds to state the sale of eight of the certificates by the plaintiffs upon the Stock-Exchange to members of the Stock-Exchange, and the sale of the other two off the Stock-Exchange to a party who was not a member. It then states that suspicion arose in the market that forged certificates for shares purporting to be shares in this company, were in circulation; that, upon inspection, the certificates so sold by the plaintiffs for the defendant, were found to *be forgeries; that a [*369 committee was appointed by the subscribers of the Stock-Exchange, to determine what ought to be done between members who had had dealings in the forged scrip; and that the committee came to the following resolution,—“that the holders of shares of the Buckinghamshire Railway Company, which have been declared by the company to be spurious, shall have the right to demand of the sellers thereof genuine shares in exchange, or, until such can be procured, to pay for the same at the rate of 2*l.* 12*s.* per share (10*s.* premium), such amount to be retained until genuine shares are given.” By the regulations of the Stock-Exchange, brokers are considered as principals. The plaintiffs were

called upon by the respective purchasers of the scrip, to refund the purchase-money, or to indemnify them from loss. They therefore applied to their principal, the defendant, for instructions or indemnity; and, the defendant declining to comply with their demand, they made certain payments to the parties to whom they had sold the scrip, such payments being based upon the principle laid down by the Stock-Exchange committee.

The question for our determination now, is, whether the plaintiffs are entitled to recover, under either count of their declaration, this ulterior amount. With respect to the general liability of the defendant, under the circumstances stated, there is no substantial difference between the learned counsel: it seems to be agreed that, where a principal employs an agent, the former is bound to indemnify the latter in respect of all payments which may be made by him in the due course of his employment. There seems also to be little doubt that the agent may recover moneys so paid by him, either under a special count stating a promise to indemnify, and a breach, or under a count for money paid. The judgment of the Court of Exchequer in **Brittain v. Lloyd* sufficiently *370] shows that. And the law in this respect is correctly stated by the late Dr. Story, in the passage cited by the plaintiffs' counsel from his treatise on Agency. *Brittain v. Lloyd* states a rather more general proposition; for, it is there said that an action is maintainable in every case in which the plaintiff has paid money to a third party, at the request, express or implied, of the defendant, with an undertaking, express or implied, to repay it. The main question in that case was, whether the money could be recovered under a count for money paid to the use of the defendant, where the payment was made under circumstances which did not relieve the defendant from an action or a liability at the suit of a third person,—which was contended to be necessary, on the authority of a case of *Spencer v. Parry*, 3 Ad. & E. 331, 4 N. & M. 770. The expressions in *Spencer v. Parry* which seem to favour that argument, must be construed with reference to the circumstances of the particular case. That the defendant would be liable to the extent of what the plaintiffs necessarily paid in the course of the due performance of their duty as his brokers, seems not to be the subject of any doubt at all. The only question is, what was the extent of the plaintiffs' liability under the circumstances of the present case.

It may be convenient at once to dispose of the question of pleading. It appears to me that the special count cannot be sustained, upon this one ground—that the contract therein alleged, though a contract which might exist, is not proved by the facts set out in this special case. The contract stated, is, that, in consideration that the plaintiffs, as brokers, would sell for and on account of the defendant certain scrip in The *371] Buckinghamshire, Oxford, and Bletchley Junction Railway *Company, the defendant promised them that the said scrip was genuine

scrip of that company, and issued by them. If that were the contract between the parties, it would follow, that, if the scrip was not genuine, but was sold in the market, and the money received by the seller, the sale never being questioned by the buyer,—who might be content to retain the spurious documents,—the plaintiffs, upon proof that the scrip was not genuine, might be entitled to a verdict for a breach of that promise. I cannot conceive any promise that would lead to such a consequence as that. The only promise, as I conceive, which the law would under the circumstances imply, is, a promise to indemnify. I therefore think the first count is out of the question.

With respect to the second count, the situation of the parties is this:—The plaintiffs were employed as brokers to sell these particular certificates. There is no statement in the case, that the defendant authorized them to enter into a contract for the sale of shares *generally*, or that, in fact, any such contract was entered into. The statement in the case is, that the defendant employed the plaintiffs to sell these identical certificates, and that the plaintiffs sold them according to that employment. Under these circumstances, we cannot proceed upon an assumption of any other sale than of these particular ten certificates. The question is, what is the result of such a sale, when the certificates turn out not to be genuine. There was no fraud or negligence on either side: the certificates were such as to deceive everybody who had anything to do with them. Still, they were invalid. There cannot be a doubt, then, that the vendees would be entitled to recover back the money they had paid for them. They did receive it back; and the plaintiffs have been repaid that sum. The question is whether the plaintiffs, the brokers who sold the scrip, can recover any more from their principal. *What [*372 they have paid beyond the mere return of the purchase-money, appears to have been paid under an order or resolution of the committee of members of the Stock-Exchange. The case does not show any course of dealing between the parties which would bind the defendant to that extent. Cases have been referred to for the purpose of showing that a man who employs a broker to buy or to sell shares for him, authorizes him to deal according to the ordinary and accustomed mode. It is not stated here that these shares are commonly sold on the Stock-Exchange. And it may very well be doubted whether the rules and regulations of the Stock-Exchange are applicable to a sale of shares made under circumstances like these. But, supposing that it were so, and that it appeared that the Stock-Exchange was a place where sales of shares are ordinarily made, so as to bind the principal,—what rule is there to show that such a resolution of a committee of inquiry as before adverted to, would be binding and obligatory as between the broker and his principal? I cannot find any such rule: nor does it appear to me that the circumstances of the present case, bring it within that resolution of the committee. Their decision may have been perfectly correct, and may have

been intended to apply to the case of a sale of shares generally, to be performed by the delivery of genuine shares; but it does not necessarily apply to the case of a sale of specific scrip, such as this was. It seems to be agreed by Mr. *Hoggins*, that this resolution of the committee is binding as between these parties, no further than as being declaratory of what is right and just. No doubt it is right and just that the defendant should refund to the plaintiffs the money he received.

The question, then, reduces itself to this,—whether, as a matter of law, the plaintiffs were bound to repay to their vendees anything further *873] than the amount of *the purchase-money? If they were, then they are entitled to recover against the defendant to that extent. I do not think they were liable, or that they are entitled in this action to recover, to a greater extent than the amount of the purchase-money. It seems to me that the transaction very much resembles the getting change for a forged bank-note; in which case the person passing it takes it back, and restores the money he obtained for it. That is all. As soon as the vendor had sold the certificates and got the money, at that instant the purchaser was entitled to say—“These certificates are not genuine: give me back my money.” His right of action arose immediately, in that way, and at that time. That right of action,—throwing the special count out of consideration,—is, a right to sue as for money paid. As the sale was a sale of specific things, I do not think the purchasers would be entitled to demand genuine scrip.

Upon the whole, I am of opinion that the amount to be recovered by the plaintiffs in this action, is, the amount for which they were liable to their vendees at the very moment the latter were entitled to recover the money back. They cannot say they paid any more to the defendant's use, because no more was necessarily paid. The defendant having paid into court all that the plaintiffs were entitled to recover, a nonsuit must be entered.

V. WILLIAMS, J. I am of the same opinion. The facts stated in the case furnish no evidence of the promise alleged in the special count, viz., that the scrip was genuine. As to that count, therefore, the plaintiffs must fail.

With respect to the count for money paid, I think the defendant must be taken to have employed the plaintiffs as brokers to sell the scrip in *874] question *according to the usual course of dealing, that is, as genuine scrip: and I think that the facts stated in the case show an implied promise on the part of the defendant to indemnify them against any legal liability which might result from their executing that authority. I do not dispute that that indemnity would cover any liability imposed upon the plaintiffs by the rules and regulations of the Stock-Exchange. But it seems to me, that, under the circumstances as here stated, the plaintiffs were not liable to their vendees, by reason of the scrip not being genuine, to an amount greater than the (nominal) value

of the scrip. They clearly would not have been liable to any greater extent, if the sale had taken place elsewhere than upon the Stock-Exchange: and I cannot discover that any larger degree of liability is imposed upon the plaintiffs, in reference to this transaction, by the Stock-Exchange rules. There is no good reason for saying that the decision of the committee imposed upon them any additional liability. As, therefore, the money paid into court is enough to cover all that the plaintiffs are, in our judgment, entitled to claim, a nonsuit will be entered.

Rule accordingly.

*CLEMENCE CAMP v. POTE. Nov. 25.

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The defendant was taken in execution upon a *ca. sa.* at the suit of the plaintiff, in June, 1841; in August in the same year, the plaintiff left England, and was shortly afterwards seen at St. Petersburg, but had never been heard of since. Upon an affidavit of these facts, and showing reasonable ground to induce them to believe that the plaintiff was dead, and alleging that proper search had been made, and no trace of a will or grant of administration found,—the court (in 1849) ordered the defendant to be discharged from custody, without regard to any supposed lien of the attorney for costs.

THE defendant was arrested on the 12th of June, 1841, upon a *ca. sa.* on a judgment obtained against him by the plaintiff, endorsed to levy 92*l.* 18*s.*, being 71*l.* 4*s.* 9*d.* for debt, and 21*l.* 13*s.* 3*d.* for costs, and was conveyed to the Queen's Prison, where he had ever since remained in execution under the above judgment only. In August, 1841, the plaintiff, being in insolvent circumstances, left England, with her daughter, in order to avoid her creditors, since which time she has not been heard of, either by her own attorney, or by the defendant, or by any other person to his knowledge, except as hereinafter mentioned. Being desirous of obtaining his liberty, the defendant caused inquiries to be made, in 1843, by one Galanté, a merchant at Hamburgh, by whom he was informed that the plaintiff and her daughter had been seen in St. Petersburg in 1841, when she left that city for Moscow, and was reported to have died upon the road. In February last, the defendant received a letter from a Russia merchant named Boville, confirming the report of the plaintiff's death on her journey to Moscow, and informing him that a person answering the description of the plaintiff's daughter had since been seen at various places beyond the confines of Europe, unaccompanied by her mother.

Upon affidavits stating the above facts, and also that search had been made at the proper office in Doctors' *Commons, to see if any will of the plaintiff had been proved, or any letters of administration [*376 to her estate and effects taken out, and that none such had been discovered,

Scott, on a former day in this term, obtained a rule calling upon the

personal representatives (if any) of the plaintiff, upon notice of the rule to be given to them or to the attorney in this cause of the said late plaintiff, why the defendant should not be forthwith discharged out of the custody of the keeper of the Queen's Prison as to this action. He cited *Broughton v. Martin*, 1 B. & P. 176, *Parkinson v. Horlock*, 2 N. R. 240, and *Taylor v. Burgess*, 16 Law Journ. Exch. N. S. 204.

Lush, on behalf of the attorney upon the record, now appeared to show cause.

Scott, for the defendant, submitted that the attorney was not entitled to be heard; referring to *Shoman v. Allen*, 1 M. & G. 96, n., where it was held that cause cannot be shown on behalf of the attorney who claimed a lien on the verdict for his costs,—the court saying, “The death of the party is a revocation of the authority of the attorney. *Non constat* that the administrator, when appointed, may think fit to go on with the cause. Administration must first be taken out, and then the cause may proceed.”

Lush. Being served with the rule, the attorney is entitled to come and show cause against it. He has a lien upon the judgment for his costs, and therefore he has a personal interest in the matter. The affidavits upon which the rule was obtained, show no ground for
*377] *discharging the defendant without payment of debt and costs.

Scott, in support of his rule. It is idle to say that the defendant is only to be discharged upon satisfying the judgment, when it appears to the court, with reasonable certainty, that the plaintiff is dead, and is unrepresented, and therefore that there is no person who has authority to receive the money. *Pyne v. Erle*, 8 T. R. 407, distinctly shows that the defendant is entitled to his discharge, without regard to the plaintiff's late attorney's lien. And the circumstance of the attorney having had notice of the rule, though it may justify his appearing, will not entitle him to his costs of opposing the rule: *Johnson v. Marriat*, 2 Dowl. P. C. 343.

WILDE, C. J. We are of opinion that the rule for discharging the defendant out of custody, must be made absolute. The defendant's affidavit lays reasonable ground for presuming that the plaintiff is dead. It appears that she has been absent from England for more than eight years, and was last seen alive in St. Petersburg, in 1841. The plaintiff's late attorney, who now comes to oppose the defendant's discharge, does not present to the court any circumstances tending to impeach the defendant's affidavit. No will of the plaintiff has been proved; nor have any letters of administration of her effects been granted; nor does the plaintiff's attorney profess to have had any communication with his client. What, then, is the situation of the attorney? He no longer represents the plaintiff; and he has no authority to receive the debt. If so,—the judgment debt being an entire thing,—it is very difficult to say that the
*378] defendant ought to pay any part of it to the *attorney as the price of his discharge. No case has been produced by Mr. *Lush*,

where a party applying for his discharge under such circumstances, has been made to pay the attorney's costs. In the absence, therefore, of any authority, we are of opinion that the attorney's lien does not extend so far as to warrant us in giving effect to it in the manner here sought.

Rule absolute.

ELIZA HICKS v. W. H. GREGORY, Executor of ROBERT GREGORY, deceased. Nov. 24.

The reputed father of an illegitimate child, upon ceasing to cohabit with the mother, wrote to her as follows:—"As I always promised that you and your child should never want, I will allow you 100*l.* a year for your life and little Emma's, to begin from the 1st of July, and to be paid quarterly, which I think will be sufficient to keep you in great comfort. Of course, if I hear of your behaving ill, or bringing up your child improperly, I will stop the allowance to you:"—Held, by WILDE, C. J., and MAULS, J. (*dissentiente* V. WILLIAMS, J.), that the letter disclosed a sufficient consideration for the promise to pay the annuity, viz. the mother's properly bringing up the child.

THIS was an action of assumpsit. The declaration stated, that, before the making of the promise of the said Robert Gregory, thereafter mentioned, to wit, on the 26th of October, 1810, the plaintiff, being then sole and unmarried, and having theretofore always conducted herself with chastity and decorum, was seduced by the said Robert Gregory, who then debauched and carnally knew the plaintiff, so being sole and unmarried as aforesaid, and by means of which said seduction and carnal knowledge the plaintiff then became pregnant, and afterwards, and in the lifetime of the said Robert Gregory, and before the making of the promise thereafter mentioned, to wit, on the 28th of September, 1813, was delivered of a bastard child, to wit, a daughter, which said child had been and was begotten by the said Robert Gregory, and is still living; that [*379 afterwards, and in the lifetime of the said Robert Gregory, and before the making of the said promise thereafter mentioned, the plaintiff, so being sole and unmarried as aforesaid, and having wholly relinquished and given up all cohabitation and immoral intercourse with the said Robert Gregory, deceased, had, at his request, undertaken and then had the care and nurture of the said child; that thereupon, afterwards, and in the lifetime of the said Robert Gregory, to wit, on the 4th of July, 1814, in consideration of the premises, and that the plaintiff would behave well, and continue to take charge of and properly bring up her said child, he the said Robert Gregory then promised the plaintiff, that he, the said Robert Gregory, his executors or administrators, would allow and pay to the plaintiff 100*l.* a year for and during the life of the plaintiff and that of the said child, to be paid quarterly, that is to say, on the 1st of July, 1st of October, 1st of January, and 1st of April, in each and every year during the time aforesaid, the first of such quarterly payments to be payable on the 1st of July, 1814; that the plaintiff had

always, from the time of the making of the said promise, behaved well and in a moral and proper manner, and continued to take charge of, and so properly to bring up, and hath so properly brought up the said child; that, before and at the commencement of this suit, the said child was, and still remained, alive,—of all which premises respectively the defendant, executor as aforesaid, afterwards, and after the death of the said Robert Gregory, to wit, on the 6th of September, 1847, had due notice; that afterwards, and after the death of the said Robert Gregory, and before the commencement of this suit, to wit, on the 1st of April, 1848, a large sum of money, to wit, 200*l.*, of the said yearly sum of 100*l.*, for eight quarters of a year, which then and after the death of the said Robert Gregory had elapsed, became due and payable to the plaintiff *380] under and by *virtue of the said promise of the said Robert Gregory in that behalf; nevertheless, the defendant, executor as aforesaid, not regarding the said promise of the said Robert Gregory, had not at any time paid to the plaintiff the said 200*l.*, or any part thereof, although often requested so to do, but had thenceforward, wholly neglected and refused so to do, and the same was wholly due and unpaid, contrary to the said promise of the said Robert Gregory, in that behalf made as aforesaid, &c.

The defendant pleaded,—first, that the said Robert Gregory did not promise, in manner and form, &c.

Secondly, the defendant, executor as aforesaid, said, that theretofore, and in the lifetime of the said Robert Gregory, to wit, on the 7th of September, 1841, by a certain indenture then made between the said Robert Gregory and the defendant of the one part, and one James Joseph Wheble of the other part, the said Robert Gregory did, for himself, his heirs, executors, administrators, and assigns, covenant with the said James Joseph Wheble, his executors, administrators, and assigns, that he the said Robert Gregory, his executors, &c., would pay to the said James Joseph Wheble, his executors, &c., the sum of 7000*l.*, and interest thereon at the rate of 6*l.* *per cent. per annum*, on a day which had passed before the commencement of this suit, to wit, the 7th of September, 1842, which said indenture was still in full force, and at the commencement of this suit there was, and still remained, due and owing, upon and by virtue of the said indenture and covenant, the said sum of 7000*l.*, and a large sum of money for interest thereon, to wit, 500*l.*; that theretofore, and in the lifetime of the said Robert Gregory, to wit, on the 26th of January, 1846, by a certain indenture then made between the said Robert Gregory and the defendant of the first part, one George Eyton of the second part, and one James Joseph Wheble of the third part, the said Robert Gregory did, *381] for himself, his heirs, &c., *covenant and agree with and to the said James Joseph Wheble, that he, the said Robert Gregory, and his heirs, would pay to the said James Joseph Wheble, his executors, administrators, and assigns, the sum of 18,000*l.*, with interest for the same at the

rate of *6l. per cent. per annum*, on a day which had passed before the commencement of this suit, to wit, on the 27th of January, 1847, without any deduction or abatement whatsoever, and that the last-mentioned indenture was in full force, and that, at the commencement of this suit, there was still due and owing upon and by virtue of the said indenture and covenant, the said sum of 18,000*l.*, and a large sum of money for interest thereon, to wit, 8000*l.*: and that the defendant had fully administered all and singular the goods and chattels which were of the said Robert Gregory, deceased, at the time of his death, and which had ever come to the hands of the defendant to be administered, except goods and chattels of small value, to wit, 5*l.*, and that he, the defendant, had not at the time of the commencement of this suit, or at any time since, nor had he then any goods or chattels which were of the said Robert Gregory, deceased, at the time of his death, in his, the defendant's hands, to be administered, except the said goods and chattels of the small value aforesaid, which were not sufficient to satisfy the said debt due and owing upon and by virtue of the said indentures and covenants, and which were subject and liable to satisfy such debt,—verification.

The plaintiff joined issue on the first plea, and as to the last prayed judgment of assets *quando*.

The cause was tried before PLATT, B., at the Oxford summer assizes, 1847, when it appeared, that, in the year 1810, an illicit connexion subsisted between the plaintiff and the testator Robert Gregory, then an under-graduate of the university of Oxford, which connexion resulted in the birth of a female child; and *that the parties continued to live together down to the month of July, 1814, when the follow- [*382
ing letter was written and sent to the plaintiff by the testator:—

“Dublin, July 4th, 1814.

“My dear Eliza,—I this day received your letter, and was much surprised at your not having heard from me, as I have written to you very often, sending you money. I suppose you have seen Townsend, informing you of the absolute necessity of my parting with you altogether. My father never would have done anything for me, if I continued living with you. But, as I always promised that you and your child should never want, I will allow you 100*l.* a year for life, and little Emma's, to begin from the 1st of July, and to be paid quarterly into the bank wherever you live; which, I think, will be sufficient to keep you in great comfort. As I shall always be most anxious for yours and child's welfare, I would by all means advise you immediately to leave Oxfordshire, and live in some county where you are not known. My father will write to Mr. Walker, the banker, about your money, as long as you remain in Oxford. I hope you will let me know what you mean to do, and any advice or assistance I can ever give you, I will with pleasure. Pray send me all my receipts, and whatever papers you have of mine of any consequence. Let me know if you owe any money, and I will pay it. Of course, if I

hear of your behaving ill, or bringing up your child improperly, I will stop the allowance to you. But I am sure you never will. I have written to Townsend to give you all the advice he can ; and, with sincere wishes for yours and child's happiness, believe me your most sincere friend,

"ROBERT GREGORY."

"Write soon, and Townsend will direct it."

*388] *The annuity was duly paid, pursuant to the above agreement, down to the time of the testator's death, in 1847. The plaintiff rested her case upon that letter, relying upon the authority of *Jennings v. Brown*, 9 M. & W. 496.

On the part of the defendant, it was insisted that the letter of July the 4th, 1814, contained no promise binding the testator.

The learned judge was of opinion that the letter was sufficient to entitle the plaintiff to maintain the action ; but he reserved to the defendant leave to move to enter a nonsuit, if the court should think otherwise.

A verdict having been found for the plaintiff for 200*l.*,

Whateley, in Michaelmas term following, obtained a rule nisi accordingly.

Keating and *Phillimore* now showed cause. The question arises upon the construction of the letter of the 4th of July, 1814. It is submitted that it shows a sufficient consideration for the promise alleged in the declaration. Mere past cohabitation would not be a sufficient consideration : *Binnington v. Wallis*, 4 B. & Ald. 650 ; *Beaumont v. Reeve*, 8 Q. B. 483. But, in *Jennings v. Brown*, 9 M. & W. 496, where the reputed father of an illegitimate child promised to pay the mother an annuity if she would maintain the child, and keep secret their connexion—it was held that the maintenance of the child was a sufficient consideration to sustain assumpsit. "The woman," said PARKE, B., in the course of the argument, "has supported the child, and that is a good consideration. It is a matter of bargain that she is to take care of the child, and to exonerate the father." In *Gibson v. Dickie*, 3 M. & Selw. 463,—

*384] cited by PATTESON, J., in *Beaumont v. Reeve*,—an agreement by the defendant to allow the plaintiff, with whom he had cohabited, an annuity, provided she would continue single, was held valid. The court must be prepared to overrule *Jennings v. Brown*, if they come to the conclusion that the consideration in the present case is insufficient. [MAULE, J. The consideration in *Jennings v. Brown* was, the mother's keeping the secret and the child : here, it is, her keeping the child and being of good behaviour. I should think that ample consideration. V. WILLIAMS, J. In *Gibson v. Dickie*, there was some arrangement about bank-stock : the case is very loosely reported ; but it is not material to the present question.] The authorities are summed up, and the conclusion now suggested arrived at in 2 Wms. Saund. 137 i. There are many moral considerations that will support an express promise : *Atkins v. Benwell*, 2 East, 505. The adequacy of the consideration is not in question.

Whateley and *Gray*, in support of the rule. This case may be dis-

posed of without at all interfering with *Jennings v. Brown*. The question is, whether the letter imports a contract such as that stated in this declaration. The only fair construction of it is, that it contains a mere expression of the writer's intention to allow the plaintiff, with whom he had cohabited, and by whom he had had a child, for whose support he was morally responsible, an annuity of 100*l.* so long as she should, in his judgment, conduct herself properly, and properly bring up the child. The testator clearly might have discontinued the payment at any time during his life. It does not amount to a contract legally binding him to pay the annuity until the woman forfeits it by *misconduct. [*385 [WILDE, C. J. Is not that the sense in which she understood it, and in which he, at the time of writing the letter, meant it? I do not see what other fair construction can be put upon it.] That which is alleged to be the consideration for the promise comes in a subsequent part of the letter. It amounts, no doubt, to a strong moral obligation; but no more.

WILDE, C. J. Upon the best judgment I can form, I am of opinion that there is upon the face of the letter of the 4th of July, 1814, a sufficient consideration for the testator's promise to pay the annuity sought to be recovered in this action. The promise is by the father of an illegitimate child, upon whom certain moral duties rested; and to the mother of the child. Looking at the circumstances and relative position of the parties, the consideration is much stronger than appears in many cases of guarantees. The object of the writer of the letter seems to have been, to preserve the child from want, to relieve himself from being compelled to support it, and to secure to the child the mother's care. It is very probable that some latent feelings of regard for a woman with whom he had been living upon terms of familiar intercourse, may have influenced his mind; but the principal object he had in view was, the care and maintenance of the child. Suppose the letter had been addressed to a stranger, who had no interest in the child, and upon whom there rested no duty or obligation to bring it up, still, if he had abided by the terms of it, and brought up the child in the prescribed manner, there would have been ample consideration for the promise to pay the annuity. I cannot help thinking the testator was actuated by a high sense of justice and moral duty, in entering into this engagement. It is impossible, in cases of this kind, to measure precisely the adequacy of the consideration the party receives: *nor does the law require it. In order to ascertain the writer's intention, we [*386 must not look at the particular collocation of the sentences, but at the whole letter together. In one part, he says: "As I always promised that *you and your child* should never want, I will allow you 100*l.* a year for life and little Emma's, to begin from the 1st of July, and to be paid quarterly into the bank wherever you live; which I think will be sufficient to keep you in great comfort." And, in another part, he says,— "Of course, if I hear of your behaving ill, or bringing up your child

improperly, I will stop the allowance to you." The writer's object is here plainly developed, that the child shall be brought up in a proper manner; and more particularly as he refers to a former promise that the mother should never want, and to his desire to keep the mother and child in comfort. Looking at the whole letter, I am unable to say to what extent the testator measured the allowance by his feelings towards the mother: but I think it is manifest that his principal object was, to relieve himself from the obligation of bringing up the child, and to cast it upon the mother: and that appears to me to be a sufficient consideration for the promise. I think, therefore, the rule should be discharged.

MAULE, J. I am of the same opinion. The motion for a nonsuit,—which I must confess I thought at the time should not have been granted,—is grounded on a suggestion that the promise and the consideration were not so proved as to entitle the plaintiff to maintain the action. Now, the promise is, to pay the plaintiff 100*l.* a year. And the substance of the consideration upon which that is to be paid, is, that the plaintiff shall properly bring up a child. The letter shows the great anxiety of the writer for the child's welfare; and it refers to some former promise,—

*387] "I always promised *that you and your child should never want. I will allow you 100*l.* a year for life, and little Emma's." No doubt the promise was proved. The early part of the letter offers an inducement to the mother to bring up the child properly; and, in the subsequent part, the writer points to the consequence of a failure to do this, viz., the loss of the allowance. It is a promise upon an executory consideration. If the child is properly brought up, then the contract being executed by the other party, the testator was bound to pay her the consideration upon the faith of which she performed the duty cast upon her. The agreement having been thus acted upon, there is, and there must have been intended to be, a binding contract. It never could have been meant, that, after the plaintiff had maintained the child upon the faith of the testator's promise, the payment of the annuity should be made or withheld at his option or caprice. I entertain no doubt that there was a binding contract, and that the consideration is accurately stated.

V. WILLIAMS, J. There is no doubt the promise in this case is properly laid and proved. And it is equally clear, that, morally speaking, the annuity ought to be paid, so long as the plaintiff continues to observe the conditions upon which it was granted. It is also clear, that the promise is valid, and capable of being enforced, if it was founded upon the consideration that the plaintiff would properly bring up the child; and that it was invalid, and incapable of being enforced, if the consideration for it was the by-gone cohabitation. The only question, therefore, is, what is the true construction of the letter of the 4th of July, 1814. I am extremely glad that the lord chief justice and my brother MAULE

*388] have come to the conclusion that the promise was founded upon an adequate legal *consideration; for, I must confess that my

own impression is, that the testator merely intended to confer upon the plaintiff a bounty which he might recall at pleasure: but, as the majority of the court entertain a different opinion, the rule will be discharged.

TALFOURD, J., having been counsel in the cause, took no part in the discussion. Rule discharged.(a)

(a) See *Linnegar v. Hodd*, 4 Man. Gr. & S. 437.

FAGAN v. HARRISON. Nov. 17.

A., a merchant at Dublin, contracted, through the agency of C. & F., merchants at Liverpool, to purchase of B., a ship-builder at Quebec, a vessel, described in the contract as then building, —B. engaging that she should be finished “in a complete and workmanlike manner, and furnished with the certificate to that effect from Lloyds’ surveyor;” and A. agreeing to pay the stipulated price by his acceptance of B.’s draft at six months after date from the day the vessel should be ready to take in cargo: and the agreement contained the following clause,—“In case of the ship not being according to B.’s representation and the within agreement, and should, on her arrival at Dublin, exhibit any defect which shall be declared as such by any two competent persons, B. hereby agrees to put it to rights, at his own expense, on her second voyage.” The vessel being finished, notice of that fact was sent to A., and on the 14th of June, 1845, a draft for the price was forwarded to him through D., for his acceptance. On the 17th, A. wrote to D. as follows:—“From the course adopted by B. we shall have some difficulty, unless you take the position which C. & F. stood in to me, viz. to guaranty that B. will fulfil the contract to the full extent and meaning as it was so understood at our agreement, which he has not done in two essential points, &c. Immediately on hearing from my agent in Quebec, I wrote to C. & F., who replied that they would be responsible as agreed on. The course taken by B. is, to avoid this, and, by getting me to accept the bill sent through your hands, would leave me no remedy but to go to law. I only require the guarantee from you that B. will perform his contract and the representations he made of the vessel. With regard to the survey which must be had,—if you agree to appoint one merchant, I will appoint the other: let them agree to an umpire. Give me a letter of guarantee that B. will abide by the award, and that he will perform his part without delay.”

To this letter, D. replied,—“We are perfectly willing to take the position in which you propose (quite reasonably) to place us. If, therefore, you accept B.’s bill, and return it to us forthwith, we hereby agree to become personally responsible to you for the due fulfilment of the conditions of B.’s contract: and, as C. & F. have the confidence of all parties, we suggest that they should be appointed to decide what ought to be done, in case, upon the ship’s arrival, you have any cause of complaint.”

Upon receipt of D.’s letter, A. accepted the bill, and paid it at maturity. On the ship’s arrival at Dublin, A. wrote to D., informing him that he had appointed Brooke to survey her on his behalf: to this D. replied,—“As your contract was made through C. & F., we leave them to adjust all differences, and we will be responsible for whatever they award.”

C. & F. appointed Pope to survey the vessel with Brooke. These two, having surveyed the vessel, reported that 351*l.* (exclusive of 25*l.*, their fees and expenses) was required to complete her according to contract; whereupon C. & F. made their award as follows:—“We, the undersigned, having been authorized by D. of London, to estimate the sum which A., of Dublin, is entitled to receive from B. of Quebec, for the deficient state in which he turned out the ship J. F., contrary to the terms of his contract, and not feeling ourselves competent for such a task,—that is, the estimating in a tradesmanlike manner such deficiencies,—did for that purpose appoint W. Pope to meet J. W. Brooke, they two to decide on the deficiencies of the said vessel, and to estimate an equivalent in money for the said deficiencies; and, those gentlemen having, after due examination, and by written certificate, declared that sum to be 351*l.*, and surveyors’ fees 25*l.*; we hereby award that the said sums together (376*l.*), be paid to A. by D., on behalf of B., with interest,” &c. —

Held, upon a special case setting out the above facts and correspondence, that there was no evi-

dence that A. had ever acquiesced in the proposal of reference to C. & F., or that the latter ever professed to act under any authority derived from A.; and, consequently, that A. was not entitled to recover against D. the sum mentioned in the so-called award.

THIS was an action of assumpsit. The declaration stated, that, theretofore, and before the making of the promises by the defendant therein-
 *389] after mentioned, *to wit, on the 21st of February, 1845, an agreement in writing was made and entered into between Thomas Conrad Lee, therein described as of Quebec, in the province of Lower Canada, and the plaintiff, whereby the said T. C. Lee agreed to sell, and the plaintiff agreed to buy, a new ship or vessel then building at Quebec, and not then launched, to be of the registered tonnage (old measure) of about five hundred and sixty tons; which said vessel was in a great state
 *390] of forwardness, *and would be launched first open water, and got ready for sea, and fitted with all despatch, so as to sail amongst the first ships from Quebec: the said ship to be sold with her hull, masts, and spars, standing and running rigging, sails, anchors, and chains all complete, as *per* inventory annexed to the said agreement, and ready for sea, deliverable to the plaintiff at Quebec the day the said ship would be ready to commence taking in cargo after she was launched; from which day the plaintiff's ownership was to commence, but prior to which the ship was to be at the risk of the said T. C. Lee: that T. C. Lee thereby engaged that the said ship would be finished in a complete and workmanlike manner, and be furnished with the certificate to that effect from Lloyds' surveyor, W. Jameson; that her anchors and chains should be new, and of the size and weight required for her size, to pass Lloyds' surveyor there for classification, except that her chains should be of the length of ninety fathoms each, as *per* inventory, and should be the same as the ship *Rose*; that the said ship should have at least one full suit of sails all new, and that her rigging should be all new, and of the sizes required for a ship of her tonnage; masts and spars to be all good and sufficient, and to have all the masts' heads of sufficient length; that the said ship should be copper-fastened, like the *Rose*, except the centre rows, which were iron, and in consideration of which T. C. Lee agreed to allow the plaintiff an abatement off the price of the ship to the extent of 25*l.*: that the iron-work should be all of proper size, and sufficient for both hull and spars; that the said ship should have a sufficient windlass on the principle of Tysack & Dobson's patent; and also to have three boats, new and good, and of sufficient size for the vessel; and that all the carpenters' and joiners' work should be well and thoroughly finished, and the whole ship finished and put out of
 *391] *hand in a thorough workmanlike manner: and the plaintiff thereby agreed to pay the said T. C. Lee for the said ship 8*l.* *per* ton, on the old measurement tonnage, payable by his acceptance of T. C. Lee's draft at six months from the date when the ship should be ready to take in cargo; which draft the plaintiff thereby bound himself to accept on

receipt of such advice of her being launched, and ready to take in, as would enable him to protect himself by insurance, which advice the said T. C. Lee thereby bound himself to give him at the same time that he notified the drawing of the said bill: the said ship was to be registered in the name of the plaintiff, and the register was to be taken out accordingly: the said ship was to be fitted similarly to the *Rose*, and in accordance with the inventory annexed to the said agreement: the said ship was to be delivered at Quebec by the said T. C. Lee, who would charge on the amount thereof the rate of commission usual at that place: *in case of the said ship not being according to the said T. C. Lee's representation, and the said written agreement, and that the said ship should, on her arrival in Dublin, exhibit any defect which should be declared as such by any two competent persons, the said T. C. Lee thereby agreed to put it to rights, at his own expense, on her second voyage:* and, lastly, it was further agreed that, in lieu of the 25*l.* as before stated to be abated by the said T. C. Lee, the plaintiff preferred to leave it to the said T. C. Lee's generosity and liberality to give him an equivalent in workmanship, or any other manner, in lieu thereof. The declaration then averred, that, the said agreement being so made as aforesaid, and the said ship being built and ready to receive cargo, the said T. C. Lee, to wit, on the 7th of May, 1845, drew upon the plaintiff a certain bill of exchange for payment of the said price so agreed to be given for the said ship or vessel, to wit, the sum of 4389*l.* 7*s.* 8*d.*, *payable six months after the date thereof: that the said ship or vessel not having been registered in the name of the plaintiff, and the register thereof not having been taken out accordingly, but, on the contrary thereof, the said ship or vessel having been registered in the name of the said T. C. Lee, and the said ship not having been well built, in a complete and workmanlike manner, and the said agreement not having been in these and in other respects fulfilled or performed by the said T. C. Lee according to the terms, true intent, and meaning thereof, and the plaintiff having by reason thereof refused to accept the said bill of exchange so drawn upon him as aforesaid, thereupon, afterwards, to wit, on the 19th of June, 1845, in consideration that the plaintiff, at the request of the defendant, would accept the said bill of exchange so drawn by the said T. C. Lee upon the plaintiff as aforesaid, and would promise and agree on his part to abide by, perform, and keep the award and determination of one E. Chaloner and one Q. Fleming, who should be appointed by and on behalf of the plaintiff and of the defendant to decide and determine what ought to be done, in case, upon the said ship's arrival at Dublin, the plaintiff should have any cause of complaint against the said T. C. Lee in respect of the said agreement, and to adjust all differences between the plaintiff and the said T. C. Lee in respect of the said agreement,—with power to the said E. Chaloner and Q. Fleming to call in two competent surveyors to survey and report upon the alleged defects and deficiencies of the said

vessel, and to estimate the amount thereof; the defendant then promised the plaintiff that he would be responsible to the plaintiff for whatever the said E. Chaloner and Q. Fleming should award and determine in that behalf, and would fulfil, abide by, and perform the award of the said E. Chaloner and Q. Fleming in the premises. The declaration then

*393] *averred*, that the plaintiff, confiding in the said promise and undertaking of the defendant, afterwards, to wit, on the day and year last aforesaid, did accept the said bill of exchange so drawn by the said T. C. Lee as aforesaid, and afterwards, at the maturity thereof, duly paid the same; that, the said ship or vessel having arrived at Dublin, and the said E. Chaloner and Q. Fleming having taken upon themselves the burthen of determining and adjusting the said matters so referred to them, did, on the 6th of April, 1846, by a certain note in writing award and adjudge that the sum of 376*l.* should be paid to the plaintiff by the defendant on behalf of the said T. C. Lee, with interest from the date of his the plaintiff's acceptance for the ship falling due, and that the said award should be paid on presentation thereof; that the said award was afterwards, to wit, on the day and year last aforesaid, duly presented to the defendant, and that he then had notice thereof; yet that the defendant had not paid to the plaintiff the said sum of 376*l.*, or any part thereof.

The defendant pleaded,—first, non assumpsit,—secondly, that Messrs. Chaloner and Fleming did not take on them the burthen of the reference,—thirdly, that Chaloner and Fleming did not make any award.

The cause came on for trial, at the summer assizes for the southern division of Lancashire, in 1848, when a verdict was found for the plaintiff, subject to the opinion of the court upon a special case, which stated, in substance, as follows:—

The plaintiff in this action is a merchant and ship-owner, carrying on business in Dublin. The defendant carried on business, under the style of Robert Harrison & Co., in London, and acted as agent for Thomas Conrad Lee, a ship-builder at Quebec.

On the 21st of February, 1845, an agreement was made between the said Thomas Conrad Lee, at Liverpool, and the plaintiff, as follows:—

*394] *“Memorandum of agreement made this 21st of February, 1845, between Thomas Conrad Lee, of Quebec, Lower Canada, and James Fagan, of Dublin, for the purchase of a new ship or vessel, now building at Quebec, and not yet launched, to be of the registered tonnage, old measure, of about five hundred and sixty tons, and got ready for sea, and fitted with all despatch. Thomas Conrad Lee agrees to sell the said ship to James Fagan, hull, masts, spars, rigging, sails, anchors, and chains, all complete, as per inventory annexed, and ready for sea; deliverable to him at Quebec the day she is ready to commence taking in cargo, from which day Mr. Fagan's ownership is to commence. Thomas Conrad Lee engages that she shall be finished in a complete and workmanlike manner, and furnished with the certificate to that effect from Lloyds' surveyor, Mr.*

Jameson. And for the said ship James Fagan agrees to pay Thomas Conrad Lee 8*l.* sterling *per* ton, payable by his acceptance of Thomas Conrad Lee's draft at six months after date from the day she is ready to take in cargo; which draft James Fagan hereby binds himself to accept, on receipt of such advice of her being launched and ready to take in, as will enable him to protect himself by insurance; which advice Thomas Conrad Lee hereby binds himself to give him at the time that he notifies the drawing of the bill. The ship to be registered in the name of James Fagan, and register taken out accordingly. In case of the ship not being according to Mr. Lee's representation and the within agreement, and should on her arrival in Dublin exhibit any defect which shall be declared as such by any two competent persons, Thomas Conrad Lee hereby agrees to put it to rights at his own expense on her second voyage.

(Signed)

"THOMAS C. LEE.

"JAMES FAGAN."

"Witness;

"QUINTIN FLEMING."

*The vessel was launched shortly afterwards, and was examined and passed by the said Mr. Jameson. The vessel was not registered in the plaintiff's name, but in that of Thomas Conrad Lee; and on the 26th of May, Thomas Conrad Lee wrote to the plaintiff, as follows:—

"Quebec, 26th May, 1845.

"Dear Sir,—The James Fagan will be loaded this week. I cannot, according to law, take out a register of the ship in your name, and have therefore been obliged to take it out in my name, and have this day forwarded to my friends, Messrs. Harrison & Co., of London, a power of attorney to transfer you the vessel, and I have to advise my having drawn on you at six months' date from the 7th of May, for 4389*l.* 7*s.* 8*d.*, amount of the ship, which you will please to accept.

"Ship James Fagan, 548½ the tons, at 8*l.* per ton = 4389*l.* 7*s.* 8*d.*"

"Yours, &c.

(Signed)

"T. C. LEE."

"To JAMES FAGAN, Esq."

On the 14th of June, 1845, R. Harrison & Co. sent the plaintiff the bill of exchange, and requested him to accept the same. The plaintiff replied as follows:—

"London, 17th June, 1845.

"Gentlemen,—I have to acknowledge the receipt of your letter, with Mr. T. C. Lee's draft for amount of new ship, which I contracted for through Messrs. Chaloner & Fleming, of Liverpool. From the course adopted by Mr. Lee, we shall have some difficulty, unless you take the position which Messrs. Chaloner & Fleming stood in to me, viz. to guaranty that Mr. Lee will fulfil the contract to the full extent and meaning as it was so understood at our agreement, which he has not done in

*396] *two essential points, viz. he has not registered the vessel in my name, as he was bound by the contract to do; he has not, when called on by my agent to remove any bad and defective beams, which were pointed out to him, and which he admitted himself should not have been put in the ship. Mr. Lee represented the floors as all black birch, and it appears many are ash. Immediately on hearing from my agent at Quebec, I wrote to Messrs. Chaloner & Fleming, who replied that they would be responsible as agreed on. The course taken by Mr. Lee, is, to avoid this, and, by getting me to accept the bill sent through your hands, would leave me no remedy but to go to law. You will perceive, by the contract, that I can have a survey of the ship on her arrival at Dublin; and that the alterations which the arbitrators may direct to be done, were left to be done on the arrival of the vessel in Quebec, on her second voyage. True, Mr. Lee may say he will do so; but he may make such delay, when I have no control over him, that it would perhaps be better not to let the ship into his hands. Mr. Lee must have some motive in not registering the vessel in my name. I only require the guarantee from you that Mr. Lee will perform his contract, and the representations he made of the vessel. I think Messrs. Chaloner & Fleming will give you assurance that I will fulfil my part. I send you copy of contract; also copy of Mr. Lee's letter to me. You will perceive that he intended you should transfer the ship at once. With regard to the survey which must be had, if you agree to appoint one merchant, I will appoint the other: let them agree to an umpire. Give me a letter of guarantee that Mr. Lee will abide by the award, and that he will perform his part without delay: or, I will accept the bill, on receiving the transfer of the ship, short 200*l.* or 300*l.*, to cover me against loss; binding myself, in case

*397] the award does not amount to *the short acceptance, to pay, at maturity, any balance in his favour.

Yours, &c.,

(Signed)

"JAMES FAGAN.

"To Messrs. HARRISON & Co."

To this the defendant answered:—

"London, 19th June, 1845.

"Sir,—We have received your letter of the 17th instant, which we have perused with attention; and we are perfectly willing to take the position in which you propose (quite reasonably) to place us. If, therefore, you accept Mr. Lee's bill for 4389*l.* 7*s.* 3*d.*, and return it to us forthwith, we hereby agree to become personally responsible to you for the due fulfilment of the conditions of Mr. Lee's contract, dated the 21st of February, for the ship James Fagan: and, as Messrs. Chaloner & Fleming have the confidence of all parties, we suggest that they should be appointed to decide what ought to be done, in case, upon the ship's arrival, you have any cause of complaint.

Yours, &c.,

(Signed)

"R. HARRISON & Co.

"To JAMES FAGAN, Esq."

To this the plaintiff replied, on the 26th :—

“26th June, 1845.

“Gentlemen,—On my return, I received yours of the 19th; and, relying on the guarantee you give me, I send enclosed the bill, accepted for the full amount of the new ship. This I do in full confidence of your house, and that you will in course of post send me the transfer and bill of sale, which, according to contract, I should have had before I accepted.

(Signed)

“JAMES FAGAN.

“To Messrs. HARRISON & Co.”

*The vessel arrived in Dublin in due course; and the plaintiff then wrote to Messrs. Harrison & Co., informing them that he [*398 appointed Mr. Brooke to survey the vessel on his behalf, and requesting them to appoint some person to survey on behalf of Mr. Lee. Much correspondence took place on the subject. Afterwards, on the 5th of August, 1845, Messrs. Harrison & Co. wrote as follows :—

“London, 5th August, 1845.

“Dear Sir,—As your contract for the James Fagan was made through Messrs. Chaloner & Fleming, we leave them to adjust all differences, and we will be responsible for whatever they award.

“Yours, &c.,

“R. HARRISON & Co.

“To JAMES FAGAN, Esq.”

Messrs. Harrison & Co. wrote also to Messrs. Chaloner & Fleming on the subject, who, on the 17th of August, appointed Mr. Pope, Lloyds' Liverpool surveyor, to meet Mr. Brooke at Dublin, and notified this to Messrs. Harrison & Co.

The two surveyors surveyed the vessel, and reported, on the 30th of August, 1845, that the sum required to complete her according to contract, was, 351*l.* exclusive of surveyors' fees and expenses, which amounted to 25*l.* This report was forwarded by Messrs. Chaloner & Fleming, together with the following award, to Messrs. Harrison & Co. :—

“We, the undersigned, having been authorized by R. Harrison & Co., of London, to estimate the sum which Mr. James Fagan, of Dublin, is entitled to receive from Mr. Thomas Conrad Lee, of Quebec, for the deficient state in which he turned out the ship James Fagan, contrary to the terms of his contract; and, not feeling ourselves competent for such a task, that is, the *estimating in a tradesmanlike manner [*399 such deficiencies, did for that purpose appoint Mr. W. Pope, Lloyds' surveyor, of this port, to meet Mr. J. W. Brooke, also of this port, they two to decide on the deficiencies of the said vessel, and to estimate an equivalent in money for the said deficiencies; and those gentlemen having, after due examination, and by written certificates, declared that sum to be 351*l.*, and surveyors' fees 25*l.*: we hereby award

that the said sums,—say, together, 376*l.*,—be paid to Mr. James Fagan, by R. Harrison & Co., on behalf of Mr. Thomas Conrad Lee, with interest from the date of his acceptance for the ship falling due; and that this award be paid on presentation hereof. Liverpool, April 6th, 1846.

(Signed)

“CHALONER & FLEMING.”

Messrs. Harrison & Co. refused to pay the sum awarded, and said in excuse,—“We were responsible for Mr. Lee’s due fulfilment of the contract; and, if, upon the return of the vessel to Quebec, in October, 1845, Mr. Lee had refused to remedy all defects according to the contract, our guarantee might have been resorted to: but, as Mr. Lee was at that time ready to do all that was necessary, we are not liable.”

If the court shall be of opinion that the plaintiff was entitled to recover, then the verdict to stand, with such damages as the court shall direct. If the court shall be of a contrary opinion, then the verdict to be entered for the defendant on such issue or issues as the court shall direct.

Martin (with whom was *Hugh Hill*), for the plaintiff.(a) The real *400] question is, whether the defendant’s letter of the 9th of April, 1846, truly represents the contract between the parties. The original agreement with Lee was, for the purchase of a ship then in the course of building at Quebec, and not yet launched,—the builder expressly engaging that the ship “shall be finished in a complete and workmanlike manner, and furnished with the certificate to that effect from Lloyds’ surveyor:” and there is nothing in the subsequent part of the contract to limit his obligation to merely remedying any defects, on the vessel’s second voyage: he bound himself that she should be put out of hand in a workmanlike manner. And of that contract there has been a clear breach, in respect of which the plaintiff might have sued Lee. The defendant’s liability will depend upon the letters of the 17th, 19th, and 26th of June, and 5th of August, 1845, and the 9th of April, 1846. In the letter of the 17th of June, the plaintiff writes,—“From the course adopted by Mr. Lee, we shall have some difficulty, unless you take the position which Messrs. Chaloner & Fleming stood in to me, viz. to guaranty that Mr. Lee will fulfil the contract to the full extent and meaning as it was so understood at our agreement, which he has not done in two essential points.” In his answer of the 19th, the defendant says,—“We are perfectly willing to take the position in which you propose (quite reasonably) to place us. If, therefore, you accept Mr. Lee’s bill for 4389*l.* 7*s.* 8*d.*, and return it to us forthwith, we hereby agree to become personally responsible to you for the due fulfilment of Mr. Lee’s contract: and, as Messrs. Chaloner & Fleming have the confidence of all parties, we suggest that they should be appointed to decide what ought to be done, in case, upon the ship’s arrival, you have any cause

(a) The point marked for argument on the part of the plaintiff, was,—“That the facts and correspondence set out in the case establish his right to the verdict on the several issues.”

of complaint." On the 26th, the plaintiff again writes to the defendant,—“Relying on the guarantee you give me, I send enclosed the bill accepted for the *full amount of the new ship.” The plaintiff having subsequently written to inform the defendant that he had [*401 appointed Mr. Brooke to survey the vessel on his behalf, the defendant, on the 5th of August, answers,—“As your contract for the *James Fagan* was made through Messrs. Chaloner & Fleming, we leave them to adjust all differences, *and we will be responsible for whatever they award.*” Is the defendant’s liability on that letter to be limited to the single stipulation in Lee’s contract, as to repairing defects on the second voyage? or does it amount to a general guarantee for the due fulfilment of that contract? It is submitted that the latter is the true construction. Supposing an action had been brought against Lee for the breach of his contract, and the evidence given by the surveyors had been given in court, could Lee have said that the only liability he incurred was that of making good the defects, provided the ship was sent out to him for that purpose? Undoubtedly not.

W. H. Watson (with whom were *James Wilde* and *Bovill*), for the defendant. (a) Harrison’s letter of the 5th of August, 1845, merely amounts to a guarantee that Lee would, on the vessel’s arriving out at Quebec, repair any defects that might be pointed out by the surveyors. Chaloner & Fleming never were in fact appointed arbitrators at all; for, although the defendant *was willing that they should be so appointed, the plaintiff never signified his assent. And, if they *were* appointed [*402 arbitrators, they never took upon themselves the burthen of the arbitration; nor did they make any award. Lee contracted to sell to the plaintiff a ship of a certain description. For any breach of that contract, Lee might be responsible in damages. All, however, that the defendant engages for is, that Lee shall perform his contract; not that he, the plaintiff, will pay such damages as may be awarded for a breach thereof. The defendant had no authority on behalf of Lee to refer the differences between him and the plaintiff to arbitration: and there is no pretence for saying that Messrs. Chaloner & Fleming ever were appointed to adjust such differences. [WILDE, C. J. The plaintiff’s acceptance of the bill was the consideration for the guarantee.] Be it so: at that time there was no such contract as that declared upon; the defendant had not agreed to be bound by the award of Messrs. Chaloner & Fleming. [MAULE, J. This is the ordinary case of a contract for a good ship, with a further stipulation, that, if the purchaser is dissatisfied, on a sur-

(a) The points marked for argument on the part of the defendant, were,—“That Messrs. Chaloner and Fleming were not appointed by him as arbitrators, with power to make an award directing him to pay any sum of money to the plaintiff, and that the plaintiff never consented to such arbitration: that Messrs. Chaloner and Fleming did not take upon themselves the character of such arbitrators, or act in that capacity, at any time up to the moment of their making the supposed award: and that Messrs. Chaloner and Fleming did not in fact make any award as such arbitrators.”

vey had, the builder will remedy defects on the next voyage out. That may be cumulative.] The defendant merely agreed to guaranty the performance by Lee of what he had at first left upperformed: the object of the reference was, to ascertain what defects required amending. In truth, Chaloner & Fleming did nothing but appoint Pope to survey the vessel. They do not even state that they have taken upon themselves the burthen of the reference. [CRESSWELL, J. In fact, they say that they are incompetent.] Precisely so. [MAULE, J. No formal reference or award was contemplated.]

Martin was heard in reply.

Cur. adv. vult.

*403] *WILDE, C. J., now delivered the judgment of the court.

This case has been argued before us on a special case which states the question for the opinion of the court to be, whether the plaintiff is entitled to recover against the defendant for any and what damages, or whether a verdict ought to be entered for the defendant on any, and, if any, on which of the issues which were joined in the cause.

The cause of action alleged in the declaration in this case is, the non-performance of an award of certain persons of the names of Chaloner and Fleming; and the declaration sets out an agreement between the plaintiff and one Thomas Conrad Lee, of Quebec, by which Lee contracted to build a ship for the plaintiff, of a certain description, and upon certain terms therein mentioned, and alleges that Lee had not performed his contract in certain respects mentioned in the declaration, and that he had drawn a bill upon the plaintiff for the price of the ship, which bill the plaintiff had refused to accept, upon the ground of the breaches of contract committed by Lee: and the declaration then alleges, that, in consideration that the plaintiff would accept such bill, the defendant had promised to abide by the award of the said Chaloner and Fleming, who should be appointed by and on behalf of the plaintiff and the defendant, to determine what ought to be done in regard to the said ship, and the differences between the plaintiff and the said Lee in relation to the said contract: and the declaration then avers that the referees undertook the burthen of the reference, and made an award directing the defendant to pay to the plaintiff the sum of money sought to be recovered in this action.

To this declaration, the defendant pleaded,—first, non assumpsit,—secondly, that Chaloner and Fleming did not take upon themselves the
*404] burthen of determining *and adjusting the matters alleged to have been referred to them,—thirdly, that Chaloner and Fleming never made any award upon the matters referred to them.

The case sets forth a great number of letters which had passed between the plaintiff and the defendant, and between the defendant and Chaloner and Fleming: but as the agreement upon which the action is brought, is alleged in the declaration to have been made in consideration that the plaintiff would accept the bill which Lee had drawn upon him for the

price of the ship, the material letters which constitute the plaintiff's evidence upon the issue of non assumpsit, are those which preceded the acceptance of the bill; and those letters are, the plaintiff's letter to the defendant, dated the 17th of June, 1845, and the defendant's answer written to the plaintiff, dated the 19th of June, and the plaintiff's reply to the defendant, dated the 26th of June.

The plaintiff's letter of the 17th of June contains the following passage:—"I only require the guarantee from you, that Mr. Lee will perform his contract, and the representations he made of the vessel:" and, in another part of the letter, he says:—"If you agree to appoint one merchant, I will appoint the other. Let them agree to an umpire. Give me a letter of guarantee that Mr. Lee will abide by the award, and that he will perform his part without delay." The defendant, in answer to this letter, says:—"If you will accept Mr. Lee's bill for 4389*l*., and return it to us forthwith, we hereby agree to become personally responsible to you for the due fulfilment of the conditions of Mr. Lee's contract. And, as Messrs. Chaloner and Fleming have the confidence of all parties, we suggest that they should be appointed to suggest what ought to be done, in case, upon the ship's arrival, you have any cause of complaint." In the plaintiff's reply, on the 26th of June,—which is the only other letter between the *parties before the acceptance of the bill,—he says: "Relying on the guarantee you give me, I send enclosed [405 the bill accepted for the full amount of the new ship. This I do in the good faith and respectability of your house, and that you will, in the course of post, send me the transfer and bill of sale."

The plaintiff, it will be observed, makes no reference whatever to the proposal of reference to Chaloner and Fleming, contained in the defendant's letter: nor can the court discover any evidence whatever in the case, in support of the affirmative of the issue upon non assumpsit.

That the plaintiff did not mean to acquiesce in the proposal of reference to Chaloner and Fleming, we think, is clear, from his letter of the 19th of June: and we think that the subsequent conduct and correspondence of the parties throughout, is inconsistent with any such agreement on his part; as it will be observed that the only persons noticed as referees in any subsequent part of the transaction, up to the time of Messrs. Chaloner and Fleming writing the letter which is called an award, were, Mr. Brooke, appointed by the plaintiff to survey the ship on his behalf, and Mr. Pope, appointed by Chaloner and Fleming, on behalf of Lee, to survey with Mr. Brooke.

And we are also of opinion that Chaloner and Fleming never professed to act under any authority derived from the plaintiff.

We are, therefore, of opinion that the verdict must be entered for the defendant upon the several issues which are joined upon the record.

Judgment for the defendant.

***406] *THE BANWEN IRON COMPANY v. BARNETT. Nov. 10.**

A certificate of complete registration granted by the registrar of joint-stock companies pursuant to the 7 & 8 Vict. c. 110, s. 7, incorporates the company, according to s. 25, notwithstanding the deed omits some of the provisions required by schedule (A.) to be inserted therein. At all events, it is not competent to a shareholder, in answer to an action for a call, to object that such certificate has been granted upon the production of an insufficient deed.

Quære, whether the judgment of the registrar, in granting or withholding a certificate, is subject to review?

DEBT. The first count stated that The Banwen Iron Company, the plaintiffs in this suit, by W. M. W., their attorney, complained of S. B. Barnett, the defendant in this suit, who had been summoned, &c. For that, at the time of the commencement of this suit, the defendant, as the holder of certain shares, to wit, 500 shares, in a certain company, to wit, The Banwen Iron Company aforesaid, was indebted to the said company in a certain large sum of money, to wit, 2400*l.*, for certain instalments of capital then due and payable in respect of the said shares: yet the defendant had not paid the said instalments, or any or either of them, or any part thereof, but the said sum of money still remained wholly due, owing, and unpaid to the said company.

There was also a count upon an account stated.

The defendant pleaded,—thirdly, to the first count, that, after the 1st of November, 1844, and before the accruing of the supposed causes of action in that count mentioned, and before the commencement of this suit, to wit, on the 1st of October, 1846, a joint-stock company, as defined in an act passed in the eighth year of the reign of our lady the Queen for the registration, incorporation, and regulation of joint-stock companies, not being a banking-company, school, or scientific or literary institution, nor a friendly society, loan society, or benefit building society, respectively, duly certified and enrolled under the statutes at any time in force respecting such societies, that is to say, a partnership

*whereof the capital, to wit, 60,000*l.*, was then agreed to be divided
***407]** into 10,000 shares of 6*l.* each, and so as to be transferrable without the express consent of all the co-partners, was established in that part of Great Britain and Ireland called England, to wit, in the city of London, for the purpose of profit to the shareholders thereof,—which partnership was not existing before, and the formation of which partnership was commenced after, the said 1st of November, 1844: That the said joint-stock company was never a company, as defined in the said statute, for executing any bridge, road, cut, canal, reservoir, aqueduct, water-work, navigation, tunnel, archway, railway, pier, harbour, ferry, or dock, which cannot, and which could not at the times of the passing and carrying into operation of the first-mentioned statute, be or have been carried into execution without obtaining the authority of parliament, nor, except as in this plea mentioned, a company as defined in such last-mentioned statute, at any time incorporated by statute or charter, or

authorized by statute or letters-patent to sue and be sued in the name of any officer or person: That the said joint-stock company was, during the time aforesaid, to wit, on the 1st of October, 1846, formed for the purposes thereafter mentioned, by deed indented then made between R. J. Browne of the first part, the several persons whose names and seals were thereunto subscribed and affixed (except the said R. J. Browne), that is to say, one S. B. Barnett, one M. R. Scott, &c., &c., of the second part (the other names of the several persons of the second part being to the defendant unknown), and E. J. Lemon of the third part; by which indenture,—after reciting as therein was recited,—the several persons whose names and seals were thereunto subscribed and affixed, declared that they had formed themselves into a company for the purpose of raising and working the mines and seams of *coal, culm, and iron-stone and iron-mine, and all and singular other the mines and [*408 minerals, fire-clay, quarries, rock, and stone, and premises comprised in and demised by the indenture of demise therein recited, and of smelting the said ironstone and iron-mine, and selling the iron produced therefrom for the benefit of the said company, and of selling and making the most in every way, subject to the provisions of the said demise, of the said mines and minerals, and fire-clay, and other the premises comprised therein and thereby saleable; and in order to carry out the purposes aforesaid, it was intended that the said company should erect smelting-furnaces, workmen's houses, and other buildings, and steam-engines and other machinery, and make the necessary roads and tramways, and have all the powers requisite to work the said premises to the greatest advantage; and it was by the same indenture agreed and declared by and between the said parties thereto, amongst other things, as follows, that is to say, that the said company should be called The Banwen Iron Company; that the principal office for carrying on the business of the company should be at No. 28 Threadneedle Street, in the city of London, with a branch office on the same premises so comprised in and demised by the said indenture of demise, to wit, &c.; that the capital of the said company should be 60,000*l.*, and should be divided into 10,000 shares of 6*l.* each, and that such capital should not be increased; [and that one S. B. Barnett, &c. &c., should be, and they were thereby appointed, directors of the said company; and the said parties to the said indenture thereby confirmed all matters, payment, acts, and deeds in and about the business of the said company at any time theretofore made or done by them, or any of them],—as by the same indenture, then sealed with the seals of the several persons parties thereto as aforesaid, except the said *E. J. Lemon, reference being had thereto, would, amongst other [*409 things, fully appear: That the nature and business of the said company as aforesaid might and did, during all the time aforesaid, and still might and did, require that the said deed of settlement should, at the time of the making thereof as aforesaid, and before the production of the

same as thereafter mentioned, and before and at the time of the granting of the certificate as thereafter mentioned, to wit, on the 1st of October, 1846, have made provision for such of the purposes set forth in the schedule (A) to the first-mentioned statute annexed, as were next thereafter mentioned, that is to say, [for prescribing the maximum number of directors to be appointed, the number of shares or the amount of interest by which they are to be qualified, the period for which they are to hold office, so that at least one-third of such directors, or the nearest number to one-third, should retire annually, subject to re-election if thought fit, and for the determination of the persons who should so retire in each year, as in the said statute and last-mentioned schedule respectively mentioned: That such deed did not at any time make provision for prescribing the period for which the said directors in that plea mentioned were to hold office, so that at least one-third of such directors, or the nearest number to one-third, should retire annually, as in the said statute and last-mentioned schedule respectively mentioned and required:] That afterwards, and before the granting of the certificate thereafter mentioned, to wit, on the 6th of October, 1846, the said indenture was produced to one Francis Whitmarsh, Esq., then being the registrar of joint-stock companies, as and for the deed of settlement of the said company, under the hands and seals of the shareholders therein, setting forth such matters, and making such provisions as are by the first-mentioned

*410] statute required to be provided for, and as and for such deed so signed and certified as in the same statute is in that behalf provided, together with a complete abstract thereof previously approved by the said registrar of joint-stock companies, and also a copy of such deed, for the purpose of registering the same; and that thereupon, on the day and year last aforesaid, on such production of such deed, and not otherwise, and notwithstanding such deed was not then conformable to the provisions of the said act as aforesaid, the said registrar of joint-stock companies granted a certificate of complete registration of The Banwen Iron Company in the said indenture and hereinbefore mentioned, contrary to the form of the statute in such case made and provided, that is to say, a certificate of complete registration then signed by him, and then sealed with the seal of his office, and then dated the day and year last aforesaid, and setting forth that the said company had been constituted completely; and that such last-mentioned company, when and after such certificate was granted as aforesaid, to wit, on the day and year last aforesaid, and thence to the commencement of this suit, was, and still continued, The Banwen Iron Company in the declaration mentioned: That, save as aforesaid, there never was any such body politic or corporate as The Banwen Iron Company in the declaration mentioned, and that the plaintiffs never were a company completely registered, and never had obtained a certificate of complete registration, otherwise than as in that plea mentioned: and that the defects and omissions aforesaid had never

been supplied by a supplementary deed or deeds registered,—verification.

To this plea the plaintiffs replied, that the said deed in the said third plea in that behalf mentioned, did before and at the time of the said production thereof to the said registrar of joint-stock companies, as and for the deed of settlement of the said company, make *provision for prescribing the period for which the said directors were to hold [*411 office, so that at least one-third of such directors, or the nearest number to one-third, should retire annually, as in the said statute and schedule respectively mentioned and required,—concluding to the country.

The defendant demurred specially to the replication to the third plea, assigning for causes,—that it tended to raise an immaterial issue, because it was consistent therewith, that, at the time of the granting the certificate by the registrar of joint-stock companies, the deed of settlement of the company did not make any provision as in the said replication mentioned, and was not then conformable to the provisions of the act as aforesaid, as alleged in the third plea;—that it alleged that both before and at the time of the production of the said deed to the said registrar, the said deed made provision as in the replication mentioned, whereas, what the deed contained before such production, was immaterial; and, although the issue raised by such replication, if found for the plaintiffs, might be material, yet, if found for the defendant, it would be immaterial and inconclusive, and, in order to raise a material and conclusive issue on the said third plea, a repleader must be awarded;—that the said replication tended to embarrass the defendant in his proofs, and to oblige him to produce evidence of immaterial matter, to wit, that the deed, before its said production, omitted to make such provision as aforesaid;—that the replication was too general, and should have set forth either the entire deed to which it referred, or so much of it as would be necessary to show that such provision as aforesaid was made according to the form of the said statute, &c.;—and that the issue raised by the said replication, was an issue of law simply, and was not triable, and was therefore bad, &c., &c. Joinder.

*The fourth plea was like the third, omitting the part within brackets in p. 408, and substituting for the lines within brackets [*412 at p. 409, the following—“for determining whether calls or instalments of payments, if any, are to be made in certain amounts and at fixed periods, and, if so, what amounts, and at what periods, as in the said statute and last-mentioned schedule respectively mentioned: That such deed did not at any time make provision for determining at what periods the said instalments of payments were to be made, as in the same statute required, although at the time of the making of the said indentures, and during the time aforesaid, to wit, on the 1st of October, 1846, the said instalments of payments, then being the said instalments of capital in

the first count of the declaration mentioned, were to be made, as by the same indenture is in that behalf provided, to wit, an instalment of 2*l.* in respect of each of the said shares."

To this plea the plaintiffs replied, that the said deed in the said fourth plea in that behalf mentioned, did, before and at the time of the said production thereof to the said registrar of joint-stock companies as and for the deed of settlement of the said company, make provision for determining at what periods the said instalments of payments were to be made as in the said statute required,—concluding to the country.

The defendant demurred specially to the replication to the fourth plea, assigning the same causes of demurrer as in the demurrer to the replication to the third plea.

Joinder in demurrer.

The fifth plea, to the second count, was similar to the third plea.

To this the plaintiffs demurred specially, assigning for causes,—that it amounted to the general issue merely;—that it was but an argument-
 *418] ative denial of *the alleged statement of accounts therein mentioned;—that, although pleaded as in confession and avoidance, it did not confess any cause of action, or give colour to the plaintiffs, inasmuch as, if the said plea as pleaded was true, and the legal inference deduced from the facts stated therein, was a valid legal inference, the plaintiffs had no colour or pretence of right to maintain the action, nor could the defendant become in any manner indebted to them as alleged;—that, if the plea sufficiently confessed a cause of action, it did not in any manner avoid the same, because, if the plaintiffs could in fact state an account with the defendant, and upon such accounting he was found indebted to them, the plea disclosed no facts or circumstances to preclude them from recovering such debt;—that, if the plea denied all power or ability in the plaintiffs to state an account with the plaintiffs, it amounted to the general issue, and was bad on that ground, and if, on the other hand, it admitted or confessed the ability of the plaintiffs to state an account, it did not disclose any legal bar or defence to an action founded on such statement of account;—that the said plea disclosed no sufficient answer to the said second count, inasmuch as it did not show that the alleged omission from the said deed of the said provision, was wilful, or that the said registrar wilfully, and with notice of the alleged omission, granted the said certificate of complete registration, or that the said registrar did not deem the said provision one which the nature and business of the company might not or did not require;—that, as the plea distinctly alleged that the said registrar granted a certificate of complete registration, and it was not alleged or shown that he acted wilfully or fraudulently in granting it, the law would intend that it was duly and legally granted, and was a legal and valid certificate, until the contrary was shown;—that the plea did not show any fact or circum-

stance *from which its illegality or invalidity could be inferred, in the absence of misconduct or fraud;—that, if the said registrar misconducted himself in granting the said certificate, the circumstances and nature of his misconduct should have been shown in the plea;—that, inasmuch as the said registrar was by the statute constituted the judge of the sufficiency and completeness of the deed of settlement when produced to him, and inasmuch as the plea showed that he did, after the production of the deed to him, grant a certificate of complete registration of the said company, which, in the absence of any allegation to the contrary, must be taken to have been granted *bond fide*, the plaintiffs were not responsible for any error in judgment of the said registrar, nor could the defendant take advantage thereof to evade the performance of his duty as a shareholder of the company, by contributing his proportion of the capital;—that the plea was repugnant and contradictory, in this, that it alleged there never was any such body politic or corporate as The Banwen Iron Company same as in the said plea mentioned, at the same time that the plea clearly showed that there was such a body politic or corporate, and also in alleging that the plaintiffs never were a company completely registered, and never had obtained a certificate of complete registration otherwise than as in that plea mentioned, whereas the plea showed that the plaintiffs were a company completely registered, and had obtained a certificate of complete registration.

Joinder in demurrer.

The sixth plea, to the second count, was similar to the fourth plea.

The plaintiffs replied to the sixth plea, that the defendant, of his own wrong, and without the cause or matters of excuse, or any of them, in the said sixth plea mentioned, failed and neglected to pay the said *sum of money, or any part thereof, in the said second count mentioned, in manner and form therein in that behalf alleged,— [*415] concluding to the country.

The defendant demurred specially to the replication to the sixth plea, assigning for causes, that the form of the said replication was inapplicable to the sixth plea, which did not contain any cause or matters of excuse for the breach in the second count mentioned;—that the plaintiffs ought to have traversed one or more of the averments in the sixth plea, in another form;—and that the said replication traversed negative matter, and the two negative averments in the sixth plea and the replication thereto, did not make a good issue.

Joinder in demurrer.

Needham (with whom was *Ellis*), for the plaintiffs. (a) The substance

(a) The points marked for argument on the part of the plaintiffs, were,—“that the pleas afford no answer to the action, because each of them alleges that a certificate of complete registration was granted to the said company, and it is not alleged that the certificate was improperly obtained, by fraud, &c.: that the said pleas do not show that the provisions alleged to have been omitted from the deed were in the judgment of the registrar such as the business of the company required, who was made by the legislature the judge of such matters: that, if they were required,

of the pleadings being, that, in the deed produced to the registrar on his being asked for a certificate of complete registration, pursuant to the statute 7 & 8 Vict. c. 110, was defective in one of the particulars pointed out in schedule (A), the question reduces itself to this,—whether the registrar is a judicial or a ministerial officer. If he is a judicial officer, the grounds upon which his certificate is given, cannot be inquired into. All the provisions of the statute tend *to show that a certain discretion to grant or to withhold the certificate, is conferred upon that officer. The statute begins with reciting “that it is expedient to make provision for the due registration of joint-stock companies during the formation and subsistence thereof; and also, after such complete registration as is hereinafter mentioned, to invest such companies with the qualities and incidents of corporations, with some modifications, and subject to certain conditions and regulations; and also to prevent the establishment of any companies which shall not be duly constituted and regulated according to the provisions of this act.” The 4th section enacts, “that, before proceeding to make public, whether by way of prospectus, handbill, or advertisement, any intention or proposal to form any company for any purpose within the meaning of that act, whether for executing any such work as aforesaid (s. 2) under the authority of parliament, or for any other purpose, it shall be the duty of the promoters of such company, and they, or some of them, are thereby required, to make to the office thereby provided for the registration of joint-stock companies (and thereafter called the registry-office) returns of the following particulars, according to the schedule (C) thereunto annexed, that is to say, 1. The proposed name of the intended company, and also 2. The business or purpose of the company, and also 3. The names of its promoters, together with their respective occupations, places of business (if any), and places of residence, and also the following particulars, either before or after such publication as aforesaid, when and as from time to time they shall be decided on, viz. 4. The name of the street, square, or other place in which the provisional place of business or place of meeting shall be situate, and the number (if any) or other designation of the house or office, and also 5. The names of the *members of the committee or other body acting in the formation of the company, their respective occupations, places of business (if any), and places of residence, together with a written consent on the part of every such member or promoter to become such, and also a written agreement on the part of such member or promoter, entered into with some one or more persons as trustees for the said company, to take one or more shares in the proposed undertaking, which must be signed by the member or promoter whose agreement it purports to be (but such agreements need not be on a stamp), and also 6. The names of the officers of

still it formed no defence, but only furnished ground for registering a supplemental deed: and that the defendant, a shareholder of the company, could not insist on such a defence, in an action for calls.”

the company, and their respective occupations, places of business (if any), and places of residence, and also 7. The names of the subscribers to the company, their respective occupations, places of business (if any), and places of residence, and also, before it shall be circulated or issued to the public, 8. A copy of every prospectus or circular, handbill or advertisement, or other such document at any time addressed to the public, or to the subscribers or others, relative to the formation or modification of such company. 9. And afterwards, from time to time, until the complete registration of such company, a return of a copy of every addition to or change made in any of the above particulars : and that, upon such registration of at the least the three particulars first before mentioned, the promoters of such company shall be entitled to a certificate of provisional registration." Then follows a clause imposing a penalty on the promoters of any company for delaying the registration thereof. And s. 7 enacts "that it shall not be lawful for any joint-stock company thereafter to be formed for any purpose within the meaning of this act, whether for executing any such work as aforesaid under the authority of parliament, or for any other purpose, to act otherwise than provisionally in *accordance [*418 with the act, until such company shall have obtained a certificate of complete registration as thereafter provided; and no joint-stock company shall be entitled to receive a certificate of complete registration, unless it be formed by some deed or writing under the hands and seals of the shareholders therein; and in or by such deed there must be appointed not less than three directors, and also one or more auditors; and such deed must set forth in a schedule thereto, in a tabular manner, according to the order thereafter mentioned, the following particulars, that is to say, 1. The name of the company, and also 2. The business or purpose of the company, and also 3. The principal or only place for carrying on such business, and every branch office (if any), and also 4. The amount of the proposed capital, and of any proposed additional capital, and the means by which it is to be raised; and where the capital shall not be money, or shall not consist entirely of money, then the nature of such capital, and the value thereof, shall be stated, and also 5. The amount of money (if any) to be raised, or authorized to be raised, by loan, and also 6. The total amount of the capital subscribed, or proposed to be subscribed; at the date of such deed, and also 7. The division of the capital (if any) into equal shares, and the total number of such shares, each of which is to be distinguished by a separate number, in a regular series, and also 8. The names and occupations and (except bodies politic) the places of residence of all the then subscribers, according to the information possessed by the officers of the company in respect of such names and occupations, and places of residence, and also 9. The number of the shares which each subscriber holds, and the distinctive numbers thereof, distinguishing the numbers of the shares on which the deposit has been paid, from those on which it has not been paid, and also 10. The names of the then directors

*419] *of the company, and of the then trustees of the company (if any), and of the then auditors of the company, together with their respective places of business (if any), occupations, and places of residence, and also 11. The duration of the company, and the mode or condition of its dissolution : And that such deed must contain a covenant on the part of every shareholder, with a trustee on the part of the company, to pay up the amount of the instalments on the shares taken by such shareholder, and to perform the several engagements in the deed contained on the part of the shareholders ; and that such deed must also make provision for such of the purposes set forth in schedule (A) to the act annexed, as the nature and business of the company may require, and either with or without provision for such other purposes (not inconsistent with law) as the parties to such deed shall think proper ; and that every such deed of settlement must be signed by at least one fourth in number of the persons who at the date of the deed have become subscribers, and who shall hold at least one-fourth of the maximum number of shares in the capital of the company ; and that every such deed must be certified by two directors of the company, by writing endorsed thereon in the form contained in the schedule (B) to the act annexed ; and that, on the production of such deed, setting forth such matters and making such provisions as are thereby required to be provided for, and being so signed and certified, together with a complete abstract or index thereof, to be previously approved by the registrar of joint-stock companies, and also a copy of such deed, for the purpose of registering the same, or as soon after such production as conveniently may be, the registrar of joint-stock companies shall grant a certificate of complete registration, according to the provisions of the act in that behalf ; and, unless such deed

*420] and other matters be so *produced, and such conditions be so performed, it shall not be lawful for him to grant such certificate ; and that, after such certificate shall be granted, it shall be taken as evidence of the proper provisions being inserted in such deed, and of the performance of the conditions thereby required previously to the granting such certificate of complete registration ; and that any defect or omission as regards the matters thereby required in any deed of settlement, may from time to time be supplied by a supplementary deed or deeds ; and that, if any such supplementary deed be not inconsistent with or repugnant to the act, or any act respecting joint-stock companies, and if it be duly registered, then it shall have the same effect as if there were only one deed for the purpose of the act ; and that, unless the same be registered, it shall be of no force or effect." [V. WILLIAMS, J. Is there any mode of repealing the certificate of the register ?] No. The 8th section enacts, " that, if any deed of settlement, or supplementary deed of settlement, whether made before or after the granting of the certificate of complete registration, appear to such registrar of joint-stock companies to be insufficient, by reason of the omission or incom-

pleteness of any of the provisions therein contained, for the purposes set forth in the said schedule (A), or if the deed contain provisions which appear to such registrar to be inconsistent with or repugnant to this act, or any act for the time being in force respecting joint-stock companies, then, as soon thereafter as conveniently may be, such registrar shall notify the same in writing to the persons or to the company by whom the deed shall have been presented for registration, specifying in such notification the particulars wherein such deed of settlement, or supplemental deed of settlement, is incomplete, or inconsistent with, or repugnant to, any such act as aforesaid." [MAULE, J. What is to *happen then?] That seems to be pointed out at the end of the [*421 7th section. The registrar is the only person to determine whether the deed does or does not comply with the requisites of the act: he is to exercise his judgment; and it is obvious that many very important matters may come in question before him. [MAULE, J. The defects which are pointed out here, are defects in some particulars required to appear in schedule (A), and not in those referred to in s. 7.] Exactly so. [MAULE, J. By what clause is the company incorporated?] By the 25th, which enacts, amongst other things, "that, on the complete registration of any company being certified by the registrar of joint-stock companies, such company, and the then shareholders therein, and all the succeeding shareholders, whilst shareholders, shall be, and are hereby, incorporated, as from the date of such certificate, by the name of the company as set forth in the deed of settlement, and for the purpose of carrying on the trade or business for which the company was formed, but only according to the provisions of this act, and of such deed as aforesaid, and for the purpose of suing and being sued, and of taking and enjoying the property and effects of the said company." Upon receiving a certificate of complete registration, the company becomes as much a corporation as if it had been so created by charter or by letters-patent: and the certificate is made evidence without other proof: s. 7. [MAULE, J. Not *conclusive* evidence. V. WILLIAMS, J. I do not see what you want with evidence, if the certificate makes the company a corporation, *proprio vigore*. MAULE, J. The provision that the certificate "shall be taken as evidence of the performance of the conditions by the act required previously to the granting such certificate," assumes that the performance may be disputed.] The company are not the less a corporation, though they may have chosen so to raise the question *as to make the provision as to evidence apply. This [*422 point underwent some discussion, though it was not decided, in *Pilbrow v. Pilbrow's Atmospheric Railway Company*, 5 Man. Gr. & S. 440: the court, however, seem to intimate an opinion that the mere obtaining a certificate of complete registration was conclusive of the fact of incorporation. In *Brittain v. Kinnaird*, 1 B. & B. 432, 4 J. B. Moore, 50, in trespass against magistrates for taking and detaining a vessel, a

conviction by the defendants under the bumboat act, 2 G. 3, c. 28 (no defect appearing on the face of the conviction), was held to be conclusive evidence that the vessel in question was a bumboat within the meaning of the act, and properly condemned. DALLAS, C. J., there says: "The general principle applicable to cases of this description is perfectly clear: it is established by all the ancient, and recognised by all the modern, decisions; and the principle is, that a conviction by a magistrate who has jurisdiction over the subject-matter, is, if no defects appear on the face of it, conclusive evidence of the facts stated in it." The law is similarly laid down by TINDAL, C. J., in *Cave v. Mountain*, 1 M. & G. 257, 1 Scott, N. R. 132. "There can be no doubt," says that learned judge, "but that, if a magistrate commit a party charged before him, in a case where he has no jurisdiction, he is liable to an action of trespass. But, if the charge be, of an offence over which, if the offence charged be true in fact, the magistrate has jurisdiction, the magistrate's jurisdiction cannot be made to depend upon the truth or falsehood of the facts, or upon the evidence being sufficient or insufficient to establish the *corpus delicti* brought under investigation." So, in *The Queen v. Bolton*, 1 Q. B. 66, it was held, that, where a conviction or order of *423] justices is returned to the Queen's Bench, and the proceedings are regular in form and in practice, and the case one over which the justices had jurisdiction, the court will not hear affidavits impeaching their decision on the facts, nor, if they return the evidence, will it review their judgment thereupon. *Allen v. Sharp*, 2 Exch. 352, is an authority to the same effect: there, a party was assessed to the duty imposed on "horse-dealers;" and it was held that the decision of the assessor, that the party was a horse-dealer, however erroneous, could not be questioned in an action. In the course of the argument of that case, PARKE, B., observes (2 Exch. 360): "Wherever a statute gives to certain persons the power of adjudicating upon a particular matter, their decision excludes all further inquiry. Here, it is as if the statute had said that the assessor shall decide whether or no the party is a horse-dealer; and the assessor having done so, his decision is final and conclusive, unless appealed against in the manner pointed out by the act: *Brittain v. Kinaird*; *Regina v. Bolton*." The position of the registrar here, is very analogous to that of the assessor there. [V. WILLIAMS, J. Your argument would show, that, if the registrar improperly withholds his certificate, you are without remedy.] It is not necessary to say that.

The fifth plea is like pleading a fact showing that the account could not have been stated: it is a special denial of that which should have been traversed generally.

The court called on

Peacock to support the pleas. It may be conceded, that, if the registrar of joint-stock companies is a judicial officer, his judgment is conclusive. But it is submitted that the statute has not invested him

with *any such power. [V. WILLIAMS, J. Do you contend that the certificate is void, if the act has not been in every particular [*424 complied with?] If the registrar grants a certificate in a case where the statute says he shall *not* grant it, the certificate is void. [V. WILLIAMS, J. If there is any false statement in the deed, the certificate is void?] Yes. [MAULE, J. That would be a very inconvenient doctrine.] The inconvenience is obviated by the provision which enables the company to supply any defect by a supplemental deed. [MAULE, J. There are in schedule (A) thirty-eight purposes for which provision is required to be made by the deed of settlement. If your argument is correct, there might be a plea that the nature and business of the company required that such and such provisions should be contained in the deed, and were not; and that would have to be tried by a jury! There is a manifest distinction between conditions and provisions: the conditions (in s. 7) are eleven in number: and they are all in this deed.] The validity of a patent may be inquired into by *scire facias*. That cannot be done here: therefore, to hold the registrar to be a judicial officer, would be to place him above the royal prerogative. [MAULE, J. In the case of a patent for incorporation, would it be a good plea, that the Queen had been deceived in her grant?] Probably not. But, if the registrar grants a certificate of complete registration, in a case where the act of parliament says that it shall not be granted, what is to be the consequence? To render the certificate available, the company must be one to which the registrar was authorized to grant a certificate. The 7th section expressly provides, "that, unless *such* deed and other matters be so produced, and such conditions be so performed, *it shall not be lawful* for him (the registrar) to grant such certificate." [MAULE, J. It does not go on to say that the certificate, if granted, *shall be void.] [*425 The 19th section, which, amongst other things, enables the board of trade to appoint an assistant-registrar, tends strongly to show that the office is not one of a judicial character. If it were so, a *mandamus* would not lie to compel the registrar to grant a certificate; and such a proceeding is now pending in the Court of Queen's Bench, in *The Queen v. Whitmarsh*, in the matter of *The National Land Company*.(a) [MAULE, J. There seem to be matters which do not appear upon the face of the deed, but which are to be inquired into by extrinsic evidence.] The registrar has no power to take evidence.

Needham, in reply. The certificate of the registrar has the full effect of incorporating the company. The circumstance of a *mandamus* being granted in the case referred to, proves nothing. In *The King v. The Justices of Middlesex*, 4 B. & Ald. 298, the Court of King's Bench held that they had no jurisdiction to grant a *mandamus* to magistrates, to make an order of maintenance on a particular parish. And the distinction is well put in *The King v. The Churchwardens and Overseers of St.*

(a) Since reported, 19 Law Journ., N. S., Q. B. 469.

Margaret and St. John, Westminster, 4 M. & S. 250, where the court say: "Although this court will not interfere by *mandamus* to compel the churchwardens and overseers to make a church-rate, which is properly of ecclesiastical cognisance, the rights and powers of which are saved by the act (10 Ann. c. 11, s. 26), yet they will put in motion their functions *in ordine ad*, i. e. to assemble in order to inquire and agree whether it be fit that a rate should be made." In *The King v. The Mayor and Aldermen of London*, 3 B. & Ad. 255, to a *mandamus* to the

*426] lord mayor and aldermen of London, *to admit and swear in A. B. to the office of alderman, they returned,—that the court of mayor and aldermen had, from time immemorial, the authority of examining and determining whether or not any person returned to them by the court of wardmote as an alderman, was, according to the discretion and sound consciences of the mayor and aldermen, a fit and proper person, and duly qualified in that behalf, whensoever the fitness and qualification of the person so returned had been brought into question by the petition of any person interested therein; and that it was a necessary qualification of the person to be admitted to the office of alderman, that he should be a fit and proper person to support the dignity and discharge the duties of the office; that A. B. having been returned to them by the court of wardmote as duly elected, a petition by persons interested in the election was presented to them, charging circumstances which rendered A. B. an unfit person to be admitted to the office of alderman; and that they took the petition into consideration, and having heard witnesses, did adjudge, according to their discretion and sound consciences, that A. B. was not a person fit and proper to support the dignity and discharge the duties of the office: and it was held, that the custom set out in the return was good and valid in law; and that, as the fitness of the person to be admitted was to be determined according to the discretion of the mayor and aldermen, it was sufficient for them to state in the return that they had exercised their discretion, and adjudged that A. B. was unfit, without giving particular reasons. Lord TENTERDEN there says: "It is said, that, allowing the custom to be good, the defendants ought to show the grounds of their disapproval; but the cases which have been cited are decisive against this objection, and so is all reason; for, if a matter is left to the discretion of any individual, or body of men, who are to

decide *according to their own conscience and judgment, it would

*427] be absurd to say that any other tribunal is to inquire into the grounds and reasons on which they have decided, and whether they have exercised their discretion properly or not. If such a power is given to any one, it is sufficient, in common sense, for him to say that he has exercised that power according to the best of his judgment." And TAUNTON, J., says: "I think that this is one of those cases in which it is probably much better that the grounds should not be disclosed, because the circumstances which regulate the exercise of a discretion like this

may be such that it would be extremely inconvenient for a traverse to be taken." Wherever the duty cast upon an officer is such as to impose upon him the necessity of exercising his discretion, his office is judicial. [MAULE, J. May it not be, that, with respect to certain classes of matters, the legislature has entitled the company to determine for itself what portion of schedule (A) is applicable to its nature and business? I should pause a long time, if I found both sides agreeing that the registrar is bound to inquire and decide whether all the matters in schedule (A) are or are not applicable to the business of the company.] Under the municipal corporation act, 5 & 6 W. 4, c. 76, s. 108, the recorder is empowered to appoint a deputy, being a barrister of five years' standing: That clearly would be a good delegation of authority, even though the party so appointed deputy was not qualified in another respect.

MAULE, J. My brother WILLIAMS and myself (a) being agreed that the pleas are bad in substance, it is unnecessary to consider whether the replications are *good or not. This is an action for calls, brought by a joint-stock company which has obtained a certificate of complete registration under the statute 8 & 9 Vict. c. 110, by the 25th section of which it is provided "that, on the complete registration of any company being certified by the registrar, such company are thereby incorporated as from the date of such certificate." That the company in question has in fact been registered, there is no doubt. But the pleas, in substance, state that the deed which was presented to the registrar (and upon which the company claims to act as a corporation), did not contain certain provisions set forth in schedule (A) to the act annexed, which the nature and business of the company required. It was argued, on the part of the defendant, that the presentation to the registrar of a deed containing such provisions, was a condition-*precedent* to the power of that officer to grant a certificate of complete registration; and that, as that condition was not duly performed, the certificate which has been granted, is void. The question is certainly one of great importance. But, upon the best consideration I have been able to give to the subject, the conclusion I have come to, is, that the matters alleged in these pleas do not prevent the company from acting as a corporation. The question turns mainly on the 7th section, which enacts, that it shall not be lawful for any joint-stock company thereafter to be formed, &c., to act otherwise than provisionally in accordance with the act, until such company shall have obtained a certificate of complete registration as thereafter provided; that no joint-stock company shall be entitled to receive a certificate of complete registration, unless it be formed by some deed or writing under the hands and seals of the shareholders therein; and that such deed must set forth in a schedule thereto, in a tabular manner, according to the order thereafter

(a) WILDE, C. J., and TALFOURD, J., having been absent (the former, at the court of criminal appeal, the latter, at *nisi prius*), when the greater portion of the argument took place, did not take part in the judgment.

the first count of the declaration mentioned, were to be made, as by the same indenture is in that behalf provided, to wit, an instalment of 2*l.* in respect of each of the said shares."

To this plea the plaintiffs replied, that the said deed in the said fourth plea in that behalf mentioned, did, before and at the time of the said production thereof to the said registrar of joint-stock companies as and for the deed of settlement of the said company, make provision for determining at what periods the said instalments of payments were to be made as in the said statute required,—concluding to the country.

The defendant demurred specially to the replication to the fourth plea, assigning the same causes of demurrer as in the demurrer to the replication to the third plea.

Joinder in demurrer.

The fifth plea, to the second count, was similar to the third plea.

To this the plaintiffs demurred specially, assigning for causes,—that it amounted to the general issue merely;—that it was but an argumentative denial of *the alleged statement of accounts therein mentioned;—that, although pleaded as in confession and avoidance, it did not confess any cause of action, or give colour to the plaintiffs, inasmuch as, if the said plea as pleaded was true, and the legal inference deduced from the facts stated therein, was a valid legal inference, the plaintiffs had no colour or pretence of right to maintain the action, nor could the defendant become in any manner indebted to them as alleged;—that, if the plea sufficiently confessed a cause of action, it did not in any manner avoid the same, because, if the plaintiffs could in fact state an account with the defendant, and upon such accounting he was found indebted to them, the plea disclosed no facts or circumstances to preclude them from recovering such debt;—that, if the plea denied all power or ability in the plaintiffs to state an account with the plaintiffs, it amounted to the general issue, and was bad on that ground, and if, on the other hand, it admitted or confessed the ability of the plaintiffs to state an account, it did not disclose any legal bar or defence to an action founded on such statement of account;—that the said plea disclosed no sufficient answer to the said second count, inasmuch as it did not show that the alleged omission from the said deed of the said provision, was wilful, or that the said registrar wilfully, and with notice of the alleged omission, granted the said certificate of complete registration, or that the said registrar did not deem the said provision one which the nature and business of the company might not or did not require;—that, as the plea distinctly alleged that the said registrar granted a certificate of complete registration, and it was not alleged or shown that he acted wilfully or fraudulently in granting it, the law would intend that it was duly and legally granted, and was a legal and valid certificate, until the contrary was shown;—that the plea did not show any fact or circum-

stance *from which its illegality or invalidity could be inferred, in the absence of misconduct or fraud;—that, if the said registrar miscondacted himself in granting the said certificate, the circumstances and nature of his misconduct should have been shown in the plea;—that, inasmuch as the said registrar was by the statute constituted the judge of the sufficiency and completeness of the deed of settlement when produced to him, and inasmuch as the plea showed that he did, after the production of the deed to him, grant a certificate of complete registration of the said company, which, in the absence of any allegation to the contrary, must be taken to have been granted *bonâ fide*, the plaintiffs were not responsible for any error in judgment of the said registrar, nor could the defendant take advantage thereof to evade the performance of his duty as a shareholder of the company, by contributing his proportion of the capital;—that the plea was repugnant and contradictory, in this, that it alleged there never was any such body politic or corporate as The Banwen Iron Company same as in the said plea mentioned, at the same time that the plea clearly showed that there was such a body politic or corporate, and also in alleging that the plaintiffs never were a company completely registered, and never had obtained a certificate of complete registration otherwise than as in that plea mentioned, whereas the plea showed that the plaintiffs were a company completely registered, and had obtained a certificate of complete registration.

Joinder in demurrer.

The sixth plea, to the second count, was similar to the fourth plea.

The plaintiffs replied to the sixth plea, that the defendant, of his own wrong, and without the cause or matters of excuse, or any of them, in the said sixth plea mentioned, failed and neglected to pay the said *sum of money, or any part thereof, in the said second count [*415] mentioned, in manner and form therein in that behalf alleged,— concluding to the country.

The defendant demurred specially to the replication to the sixth plea, assigning for causes, that the form of the said replication was inapplicable to the sixth plea, which did not contain any cause or matters of excuse for the breach in the second count mentioned;—that the plaintiffs ought to have traversed one or more of the averments in the sixth plea, in another form;—and that the said replication traversed negative matter, and the two negative averments in the sixth plea and the replication thereto, did not make a good issue.

Joinder in demurrer.

Needham (with whom was *Ellis*), for the plaintiffs.(a) The substance

(a) The points marked for argument on the part of the plaintiffs, were,—“that the pleas afford no answer to the action, because each of them alleges that a certificate of complete registration was granted to the said company, and it is not alleged that the certificate was improperly obtained, by fraud, &c.: that the said pleas do not show that the provisions alleged to have been omitted from the deed were in the judgment of the registrar such as the business of the company required, who was made by the legislature the judge of such matters: that, if they were required,

the first count of the declaration mentioned, were to be made, as by the same indenture is in that behalf provided, to wit, an instalment of 2*l.* in respect of each of the said shares."

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although the said David Jevons afterwards, and after the making of the said promise, and before the commencement of this suit, to wit, on, &c., paid to the plaintiffs the sum of 20*l.*, parcel of the said several sums of 46*l.* and 50*l.*, yet the said David Jevons had not paid the residue of the said several sums of 46*l.* and 50*l.*, to wit, the sum of 76*l.*, but the same still remained due and owing and unpaid from the said David Jevons to the plaintiffs,—of which the defendant afterwards, and before the commencement of this suit, to wit, on, &c., had due notice, and thereby, and according to the tenor and effect of her said promise, she the defendant became liable to pay the plaintiffs the said sum of 76*l.* when thereunto afterwards requested; yet the defendant had disregarded her said promise, and had not, although afterwards, and before the commencement of this suit, to wit, on the day and year last aforesaid, requested by the plaintiff so to do, paid the said sum of 76*l.*, or any part thereof, and the said sum of 76*l.* still remained due, owing, and unpaid to the plaintiffs, &c.

*439] *To this declaration, the defendant demurred specially, assigning for causes, amongst others,—that, although it was a part of the consideration for the defendant's promise, that the plaintiffs should give David Jevons credit for the said goods to be supplied as in the declaration mentioned, yet it was not averred in the declaration that the said other goods ever were supplied, or that the last-mentioned credit ever was given, and that it did not appear that the time for supplying the said other goods to David Jevons had arrived or elapsed before the commencement of this suit, and that it was not sufficient to aver that the plaintiffs were ready to supply such goods, if the time agreed upon for such goods to be supplied had not come, and that the declaration should have stated when the said other goods were to be supplied;—that it was not stated in the declaration, except argumentatively and by way of inference, that the said sums for which the action was brought were or had become due before the commencement of this suit, or that the credit in the guarantee mentioned, had been given;—that the promise declared on did not correspond with the instrument set out in the declaration; for that, by the instrument as set out, the promise of the defendant extended only to any sum, not exceeding 120*l.*, due to the plaintiffs by David Jevons; whereas, the promise stated in the declaration extended to any sum, not exceeding 120*l.*, which might at any time be due by David Jevons to the plaintiffs; and that, inasmuch as the instrument as set out extended only to sums then due, and not to sums to become due, the breach ought not to have included the sum in the declaration secondly above mentioned, which was not due at the date of the guarantee; and that the breach was therefore too large; or, if the promise to be inferred from the instrument was as stated in the declaration, and extended to any sum that might at any time *be due, then the breach ought

*440] not to have included the said first-mentioned sum, which was

actually due at the date of the said guarantee or instrument, as appeared from the declaration; and that the breach in the declaration mentioned did not therefore correspond with the promise as alleged, or with the instrument or guarantee as set forth, &c.

The plaintiffs joined in demurrer.

Bovill, in support of the demurrer. The extreme uncertainty of the case renders it difficult to put a construction upon an instrument of this kind. On the present occasion, the main question arises upon the meaning of the words "giving credit." Do they apply to both past and future debts, or only to such as had accrued at the time of giving the guarantee? [MAULE, J. The proper mode of construing an instrument of this sort, is, to give its words the largest sense of which they are fairly susceptible.] The terms of the instrument are ambiguous in that respect, as well as with regard to the limit of the defendant's responsibility, which is, "to pay any sum, not exceeding 120*l.*, due to the said Edwards, Ringer & Co. by the said David Jevons." Do those words apply to money *then* due, or to money thereafter to become due? To entitle a plaintiff to sue upon a guarantee, there must be a consideration distinctly expressed or necessarily to be implied: *Hawes v. Armstrong*, 1 N. C. 761, 1 Scott, 661; *Raikes v. Todd*, 8 Ad. & E. 846, 1 P. & D. 138; *Bentham v. Cooper*, 5 M. & W. 621; *Price v. Richardson*, 15 M. & W. 539. In *Hawes v. Armstrong*, TINDAL, C. J., says: "Undoubtedly, it is extremely probable, from the amount *of the debt due from Armstrong & Dell agreeing [*441 exactly with the amount of the bills enclosed in the letter, that such bills were sent as a security for the debt then due, and, if so, that the forbearance for the time the bills had to run must have formed the ground for the promise of the defendant: but there is no *written evidence* to show that such was the case; and, after proof of the existence of such debt by parol evidence (which might be admitted), the great link in the chain of the evidence would still be wanting, and there would be nothing but parol evidence to supply it, viz., that the forbearance of suing for that debt was the consideration for the particular promise." [V. WILLIAMS, J. In *Hawes v. Armstrong*, it was necessary to add to, not merely to explain, an ambiguous instrument, to imply a consideration.] In *Cole v. Dyer*, 1 C. & J. 461, Lord LYNTHURST says: "It appears to me, that, if, in such a written agreement to be answerable for the debt of another person, two distinct considerations may, with equal probability, be inferred as the inducement for that engagement, the writing is not taken out of the operation of the statute of frauds, and consequently can give no right of action." [WILDE, C. J. There are many cases where parol evidence has been admitted to eke out a guarantee.] *Haigh v. Brooks*, 10 Ad. & E. 809, 2 P. & D. 477, was a case of that sort: there, the guarantee was as follows:—"Messrs. H. In consideration of your being in advance to L. in the sum of 10,000*l.*, for the purchase of cotton, I do hereby give you my guarantee for that amount on their behalf. J. B.:" and it was

held by the court of error (10 Ad. & E. 323, 4 P. & D. 288), affirming the judgment of the court below, that the guarantee did not necessarily imply a past advance; and that the plaintiffs, on a trial, might *442] have offered evidence to show that future advances had been contemplated. [V. WILLIAMS, J. The last case on the subject is *Goldshede v. Swan*, 1 Exch. 154, and that is to the same effect as *Haigh v. Brooks*.] Parol evidence, however, is not admissible to explain the meaning of the words "giving credit." It means, ordinarily, creating a debt by giving credit. [WILDE, C. J. May it not also mean, giving an extended time for payment for goods already supplied?] The meaning of the parties must be collected with certainty from the instrument itself.

Karslake, contra. The consideration is sufficient, and the promise well alleged. In *Newbury v. Armstrong*, 6 Bingh. 201, 3 Moore & P. 509, the words of the guarantee were,—“I agree to be security to you for J. C., late in the employ of J. P., for whatever you may intrust him with while in your employ, to the amount of 50*l*.” and it was held that the consideration for the guarantee sufficiently appeared. “We ought not,” says TINDAL, C. J., “to be too strict in the construction of these instruments; for, if every agreement entered into by a tradesman be so minutely criticised, it will be necessary to resort to an attorney in the most common intercourse of life.” The same rule is adopted in *Goldshede v. Swan*. Another rule applicable to cases of this sort, is that adverted to by ALDERSON, B., in *Mayer v. Isaac*, 6 M. & W. 605, where that learned judge says: “There is a considerable difficulty in reconciling all the cases on this subject, arising principally from their not being at one as to the principle of decision: some laying it down that a liberal construction ought to be *443] put upon the instrument, in favour of the person giving the guarantee,—as in *Nicholson v. Paget*, 1 C. & M. 68, 8 Tyrwh. 164; others, that it ought to be strictly construed,—as in *Mason v. Pritchard*, 12 East, 227. Undoubtedly, the generally-received principle of law is, that the party who makes any instrument, should take care so to express the amount of his own liability, as that he may not be bound beyond what it was his intention that he should be; and, on the other hand, that the party who receives the instrument, and parts with his goods on the faith of it, should rather have a construction put upon it in his favour, because the words of the instrument are not his, but those of the other party. And therefore, if I were obliged to choose between the two conflicting principles which have been laid down on this subject, I should rather be disposed to agree with that given in *Mason v. Pritchard*, than with the opinion of BAYLEY, B., in *Nicholson v. Paget*.” It may be conceded, that, if the instrument shows no consideration upon the face of it, the defect cannot be aided by averment or by evidence. But here, it is submitted, that giving credit is a good consideration, and prospective. [WILDE, C. J. The declaration

gives as the state of facts to which the guarantee is to apply, an existing debt, and an extended credit. The consideration is limited to a future supply of goods: and none have been supplied.] The question is, whether there is any consideration at all,—whether, upon the whole declaration, the guarantee is good. It has been laid down over and over again that you may resort to extrinsic evidence to explain a guarantee. Such evidence was received in *Shortrede v. Cheek*, 1 Ad. & E. 57, 3 N. & M. 866, and *Johnston v. Nicholls*, 1 Man. Gr. & S. 251. In **Russell v. Moseley*, 3 B. & B. 211, the guarantee was as follows:— [*444 “I hereby guaranty the present account of H. M. due to R. T. S., of 112*l.* 4*s.* 4*d.*, and what she may contract from this date to the 30th September next:” and it was held that the consideration sufficiently appeared on the face of the instrument.

Bovill was heard in reply.

WILDE, C. J. It is undoubtedly to be lamented that so much ambiguity has of necessity arisen in cases of this description. But when it is remembered that these instruments are ordinarily drawn up by persons possessing no legal knowledge, and having no ready means of inquiring as to their formal requisites, little surprise will be felt at the diversity and apparent conflict of the decisions on the subject. Considering, however, the importance in a commercial point of view, that every reasonable facility should be given in the enforcement of guarantees, one is extremely desirous, where parties have acted upon the faith of such engagements, that they should, if possible, be sustained. Bearing this principle in view, let us apply our minds for a moment to the terms of this guarantee, and then see how the authorities that have been cited bear upon it. The words are,—“In consideration of Messrs. Edwards, Ringer & Co., tobacco manufacturers, Bristol, giving credit to Mr. David Jevons, grocer, Tipton, I hereby engage to be responsible, and to pay, any sum, not exceeding 120*l.*, due to the said Edwards, Ringer & Co. by the said David Jevons.” It is objected that the words “giving credit” are ambiguous and uncertain,—they may refer to credit already given, or to future credit,—and therefore the guarantee is bad. The *answer to this objection is, that there are authorities to show that such words may embrace both past and future credit, [*445 and may be applied to whichever may be found to exist. Thus, in *Haigh v. Brooks*, the words “in consideration of your being in advance to L.,” were held not necessarily to imply a past advance. So, in *Goldshede v. Swan*, the words “in consideration of your having this day advanced,” &c., were held to be sufficiently ambiguous to admit of evidence to show that the advance was not a past one, but was made simultaneously with the execution of the guarantee. If only one consideration existed, and that by-gone, the consideration would not be good: but, if there were both a future and a past consideration, it would suffice. *Haigh v. Brooks* has not been impugned by any subsequent authority; and it has repeat-

edly been followed. Applying its doctrine to the present case,—the words “giving credit” are equally capable of embracing a by-gone or a future credit. What does this declaration show? That there had been antecedent dealings between the plaintiffs and David Jevons, in the course of which the latter had become indebted to the plaintiffs, and that they had been requested, and had agreed, to give him an extended credit, upon the defendant’s giving them a guarantee. I thought at first that the words might mean “had been contracted to be given:” but I am satisfied, that, reading the whole together, the result is this,—David Jevons, being indebted to the plaintiffs in two sums, one of which was due, and the other growing due, applied for an extension of credit as to both, and that the guarantee was given as an inducement for such extension of credit. Now, let us see whether the declaration does bear that construction. It begins with stating that David Jevons was indebted to the plaintiffs in the sum of 46*l.* for goods sold, and which sum was then *446] payable: it then states that they *had sold other goods to David Jevons, to the amount of 50*l.*, at a credit of one month, which had not yet expired: it then goes on to state, that, before the giving of the guarantee, David Jevons had requested the plaintiffs to forbear and give him a reasonable extension of credit in respect of both these debts, and also to supply him with other goods upon credit,—which the plaintiffs agreed to do, upon having the defendant’s guarantee. Does not that in effect say, that there had been a negotiation for further time to pay the two debts, and for a future supply of goods, and that the plaintiffs had agreed to give time and to supply goods, provided the defendant would guaranty the payment, and that the guarantee was given in consideration of the premises? What, then, is the meaning of “giving credit?” The authorities clearly show that it may mean the forbearance of a past or a future debt: and that the declaration shows it was future. It seems to me that the guarantee is not ambiguous upon the face of it. That which is applicable equally to two states of circumstances, cannot be called ambiguous. I think the guarantee is good, and properly declared on, and therefore that the plaintiffs are entitled to judgment on this demurrer.

The rest of the court concurring,

Judgment for the plaintiffs.

*447] *CHINN, a Pauper, v. BULLEN. Nov. 24.

The Judge of a county-court has power under the 9 & 10 Vict. c. 95, s. 78, to allow parties to sue before him *in formâ pauperis*.

Where, therefore, a plaintiff suing in *formâ pauperis* in the superior court, recovered less than 20*l.* in an action of debt, the court ordered a suggestion to be entered, to deprive him of costs.

THIS was an action of debt, for wages. The plaintiff had *pendente lite* obtained an order to sue in *formâ pauperis*; and, at the trial before

TALFOURD, J., at the first sitting for Middlesex, in this term, he obtained a verdict for 10*l*.

Skinner, on a former day, obtained a rule calling upon the plaintiff to show cause why a suggestion should not be entered to deprive him of costs, under the 9 & 10 Vict. c. 95, s. 129, on the ground that the action was brought for a cause for which a plaint might have been entered in the county-court.

G. Atkinson now showed cause. A plaintiff who is admitted to sue *in formâ pauperis*, by virtue of the statute 11 H. 7, c. 12, is not within the 9 & 10 Vict. c. 95. The statute 11 H. 7, c. 12, is referable only to proceedings commenced by original writ, and is in express terms confined to the three superior courts of common law: and, though the county-court is to a certain extent a court of record, the language of the statute of Henry is inapplicable to it. The whole scope of the county-courts act shows that it contemplates fees at each step payable by the party suing; s. 37: and no exception is made in favour of paupers.

MAULE, J. I apprehend that the law as to parties suing *in formâ pauperis* is subordinate to the general law of the land. The 78th section of the 9 & 10 Vict. c. 95, enacts "that five of the judges of the superior *courts of common law at Westminster, including the lord chief [*448 justice of the Court of Queen's Bench, the lord chief justice of the Court of Common Pleas, and the lord chief baron of the Court of Exchequer, or one of the said chiefs at the least, shall have power to make and issue all the general rules for regulating the practice and proceedings of the county-courts holden under this act, and also to frame forms for every proceeding in the said courts for which they shall think it necessary that a form be provided, and also for keeping all books, entries, and accounts to be kept by the clerks of the said courts, and from time to time to alter any such rule or form; and the rules so made, and the forms so framed, shall be observed and used in all the courts holden under this act; and, *in any case not expressly provided for herein, or by the said rules, the general principles of practice in the superior courts of common law may be adopted and applied, at the discretion of the judges, to actions and proceedings in their several courts.*" These latter words, I think, make an end of the objection. The judges of the county-courts may exercise the same discretionary power as to allowing parties to sue *in formâ pauperis*, which the judges of the superior courts exercise.

WILDE, C. J. Of all others, one would think paupers the fittest suitors for county-courts.

The rest of the court concurring,

Rule absolute.

*449] ***ACRAMAN and Others, Assignees of THOMAS SWIFT, a Bankrupt, v. MORRICE. Nov. 22.**

A. contracted with B. to purchase of him the trunks of certain oak trees, then felled, and lying at Hadnock, about twenty miles from Chepstow. The course was, for A.'s agent to select and mark those portions which he intended to purchase, and for B. to sever the tops and sidings, and float the trunks down the river Wye to A.'s wharf at Chepstow, and there deliver them. After a portion of the timber had been delivered, and the whole paid for, B. became bankrupt; whereupon A. sent his men to B.'s premises at Hadnock, and severed and carried away the marked portions of certain trees:—Held, that no property in the trees, or any portion of the trees, which had not been delivered by B., passed to A. by the contract; and that there was no delivery or acceptance to satisfy the statute of frauds: and, consequently, that the assignees of B. were entitled to recover the value, in trover.

TROVER, for certain oak timber. The first count alleged a conversion before, and the second after, the bankruptcy of Swift.

The defendant pleaded,—first, to the whole declaration, not guilty,—secondly, to the first count, that Swift was not possessed of the goods and chattels in that count mentioned, &c., as of his own property, in manner and form, &c.,—thirdly, to the second count, that the plaintiffs were not possessed of the goods and chattels in that count mentioned, &c., as of the property of the plaintiffs as such assignees as aforesaid, in manner and form, &c.

The cause was tried before COLERIDGE, J., at the Bristol summer assizes, 1848. The facts which appeared in evidence were as follows:—The bankrupt Swift was a timber-dealer at Monmouth. The defendant was a timber-merchant in London, and was in the habit of contracting largely for the supply of timber to her Majesty's dock-yards. This action was brought to recover the value of certain oak timber which had been purchased of Swift by the defendant, and marked, measured, and paid for, before the date of the *fiat*, but *not actually delivered
*450] at the appointed place, and of which the defendant possessed himself after the *fiat*, under the circumstances hereafter mentioned.

There had been a long course of dealing between the parties, of this kind:—The trees being felled, the defendant sent an agent to inspect them, and to measure and mark such portions of them as were suited for his purpose. It then became the duty of Swift to cut off those parts which the defendant's agent had rejected, and, at his own expense, to convey and deliver the trunks to the defendant at Chepstow.

The timber which was the subject of this action, formed part of a large number of trees which the defendant had, at the close of the year 1847, verbally agreed to purchase of Swift, and which had been measured and marked by the defendant's agent, but the rejected portions of which had not been severed by Swift before the issuing of the *fiat*. The *fiat* was dated the 15th of April, 1848. After that day, the defendant sent men to the bankrupt's premises at Hadnock, in the Forest of Monmouth, who severed from the trunks those parts of the trees which the defend-

ant had not agreed to take, and carried away those portions which he had purchased.

On the part of the defendant, it was insisted that the measuring and marking of the timber by his agent, was a sufficient delivery and acceptance within the statute of frauds, and passed the property in it to him.

The learned judge intimated a contrary opinion, and directed the jury to find for the plaintiffs for the agreed value of the timber so taken,—leave being reserved to the defendant to move to enter a verdict for him, if the court should think that the property had, under the circumstances, vested in him.

The jury accordingly returned a verdict for the plaintiffs, damages 95*l*.

**Cockburn*, in the following Michaelmas term, pursuant to the leave reserved to him, moved for a rule nisi to enter a verdict for [451 the defendant. He submitted, that enough had been done to pass the property in the timber to the defendant, before the issuing of the *fiat*; and that, the severance of the tops and sidings from the trunks being an obligation imposed upon the vendor for the purchaser's benefit, it was competent to the defendant to do it himself. [WILDER, C. J., referred to *Rugg v. Minett*, 11 East, 210. There, turpentine in casks was sold by auction, at so much per cwt., and the casks were to be taken at a certain marked quantity, except the last two, out of which the seller was to fill up the rest before they were delivered to the purchasers, on which account the last two casks were to be sold at uncertain quantities; and a deposit was to be paid by the buyers at the time of the sale, and the remainder within thirty days of the goods being delivered; and the buyers had the option of keeping the goods in the warehouse, at the charge of the sellers, for those thirty days, after which *they* were to pay the rent; and the buyers having employed the warehouseman of the sellers as their agent, he filled up some of the casks out of the last two, but left the bungs out, in order to enable the custom-house officer to gauge them; but, before he could fill up the rest, a fire consumed the whole in the warehouse, within the thirty days: and it was held that the property passed to the buyers, in all the casks which were filled up, because nothing further remained to be done to them by the seller; for, it was the business of the buyers to get them gauged, without which they could not have been removed; and the act of the warehouseman, in leaving them unbunged after filling them up, which was for the purpose of gauging, must be *taken to have been done by him as agent for the buyers, whose concern the gauging was: but that [452 the property in the casks which were not filled up, remained in the seller, at whose risk they continued.] According to the principle of that case, the property in the timber had passed to the purchaser; all that remained to be done by the seller being, the severance of the tops and sidings. [MAULE, J. This question recently underwent a good deal of discussion

before the Privy Council, in a case of *Logan v. Le Mesurier*, 6 Moore's P. C. Cas. 116. There, A. & Co., of Montreal, entered into a written contract with B. & Co., for the sale of a quantity of red-pine timber, then lying above the rapids, Ottawa River, stated to consist of 1391 pieces, measuring 50,000 feet, more or less, to be deliverable at a certain boom at Quebec, on or before the 15th of June then next, and to be paid for by the purchasers' promissory notes of ninety days from that date, at the rate of $9\frac{1}{2}d.$ per foot, measured off: if the quantity turned out more than above stated, the surplus was to be paid for by the purchasers at $9\frac{1}{2}d.$ per foot, on delivery; and, if it fell short, the difference was to be refunded by the sellers. The price of the 50,000 feet at the agreed rate, was paid by B. & Co. according to the terms of the contract. The timber was not delivered on the day prescribed in the contract of sale; and, when it arrived at Quebec, and before it was measured and delivered, the raft was broken up by a storm, whereby a great part of the timber was dispersed and lost. B. & Co., after the storm, collected such of the timber as could be saved, paid salvage for it, and applied the timber saved to their own use. In an action brought by B. & Co. against A. & Co. to recover the amount paid on their promissory notes, and for a breach of the contract, and for the difference *between the con-
*453] tract price of $9\frac{1}{2}d.$ per foot, and $10\frac{1}{2}d.$ per foot, the market price when the timber was to have been delivered, it was held, by the Judicial Committee, affirming the judgment of the Court of Appeals in Lower Canada,—first, that the action was maintainable,—secondly, that, by the terms of the contract, until the measurement and delivery of the timber was made, the sale was not complete; that the transfer of the property was postponed until the measurement at the delivery; and that the risk remained with the sellers,—and, thirdly, that the taking possession of a part of the timber by B. & Co., after the day mentioned for the delivery thereof in the contract, and not at the place, could not be considered as an acceptance of the whole; nor could it be considered as an admission that the property in the timber passed to them before the storm which broke up the raft.] There, something remained to be done to ascertain the quantity of the timber: that case, therefore, does not conclude this.

A rule nisi having been granted,

Butt, *Kinglake*, Serjt., and *M. Smith*, showed cause. The sole question is, whether there was any delivery and acceptance of this timber, prior to the date of the *fiat* against Swift, to divest the property out of the bankrupt, and to pass it to the defendant. The facts are short and undisputed. Swift had agreed to sell to the defendant certain unsevered portions of certain trees which had been selected, measured, and marked by the defendant's agent, preparatory to their being severed and trimmed. The severing and delivery of the trunks at the defendant's wharf at Chepstow,—which is about twenty miles from Hadnock, where the tim-

ber was lying,—were to be done by, and at the expense of, Swift. After the date of the *fiat* against Swift, and while the messenger was in possession, the *defendant sent his men to Swift's wharf at Hadnock, to sever and remove those portions of the trees which he had [*454 agreed to purchase. Something remaining to be done by the seller, viz. severing the tops and sidings, and floating the timber down the Wye, to the defendant's premises at Chepstow, the case falls precisely within that of *Rugg v. Minett*. [WILDE, C. J. Is not the result of all the cases this, that the property does not pass to the vendee, where anything remains to be done to it by the vendor, to sever the part sold from the bulk, or to ascertain the quantity?] That undoubtedly is the principle which pervades all the cases. [MAULE, J. Suppose a horse were sold, to be shod by the seller, and afterwards delivered to the purchaser,—would the property in him pass before the operation of shoeing had been performed?] It is probable that it would: that very case is put by way of illustration in the course of the argument of *Rugg v. Minett*. In *Bill v. Bament*, 9 M. & W. 36, the defendant ordered goods of H., the del credere agent of the plaintiff, at a stipulated price, to be paid for on delivery; and, on receiving notice that the goods had arrived at H.'s warehouse, went there, and directed a boy, whom he saw there, to put a certain mark on the goods: on the defendant's refusal to receive the goods, by reason of a dispute about the price, an action was commenced against him by the plaintiff; after which, at H.'s request, the defendant wrote in H.'s ledger, at the bottom of a page containing the statement of the goods in question, and headed with the plaintiff's name, the words "Received the above," which he signed: and it was held, that there was no evidence to go to the jury of a *delivery and acceptance* sufficient to satisfy the statute of frauds. PARKE, B., says: "The direction to mark the goods, was evidence *to go to the jury, *quo animo* the defendant took possession of them: so also, the receipt was some evi- [*455 dence of an acceptance. But there must also be a *delivery*; and to constitute that, the possession must have been parted with by the owner, so as to deprive him of the right of lien." [MAULE, J. In that case, *any* goods of the same sort, would have satisfied the contract. Here, the subject-matter of the contract is ascertained from the first.] In *Laidler v. Burlinson*, 2 M. & W. 602, where there was an entire contract to purchase when finished, a ship then in course of building, it was held that no property in her passed until she was finished.(a) In *Baldey v. Parker*, 2 B. & C. 37, 3 D. & R. 220, A. went to the shop of B. & Co., linen-drappers, and contracted for the purchase of various articles, each of which was under the value of 10*l.*, but the whole amounted to 70*l.* A separate price for each article was agreed upon; some, A. marked with a pencil, others were measured in his presence, and others he assisted to cut from larger bulks. He then desired that an account of the whole might be

(a) See *vide* *Goss v. Quinton*, 3 M. & G. 825, 4 Scott, N. R. 471.

sent to his house, and went away. A bill of parcels was accordingly sent, together with the goods, when A. refused to accept them: it was held,—first, that this was all one contract, and therefore within the 17th section of the 29 Car. 2, c. 8,—secondly, that there was no delivery and acceptance of any of the goods, so as to take the case out of the operation of that section. So, in *Simmons v. Swift*, 5 B. & C. 857, 8 D. & R. 693, where the owner of a stack of bark entered into a contract to sell it at a certain price *per ton*, and the purchaser agreed to take and pay for it on a day specified, and a part was afterwards weighed and delivered to him,—it was held that the property in *the residue *456] did not vest in the purchaser until it had been weighed, that being necessary in order to ascertain the amount to be paid; and that, even if it *had* vested, the seller could not, before that act had been done, maintain an action for goods sold and delivered,—or (per *LITLEDALE, J.*) for goods bargained and sold. [*MAULE, J.* The subject of sale was not ascertained at all. Suppose I have 1000 bushels of corn in a heap, and a man agrees to buy one bushel of it,—would it not be preposterous to say that any particular bushel passed?] *Smith v. Surman*, 9 B. & C. 561, 4 M. & R. 455, is an authority to the same effect: there, the contract was for a sale of growing trees. In *Maberley v. Sheppard*, 10 Bingh. 99, 3 M. & Scott, 486, the plaintiff built a wagon for the defendant: the latter employed a smith to affix thereon the iron-work, and a tilt-maker, to put on a tilt: but the wagon remained in the possession of the plaintiff: and it was held that the affixing of these articles to it, was not such an acceptance of the wagon by the defendant, as to satisfy the statute of frauds.

Cockburn (with whom was *Barstow*), in support of the rule. The general doctrine, that, where something remains to be done by the vendor of goods, before their delivery, the property in them does not pass to the vendee, is not controverted. But the meaning of that proposition is this,—that the thing to be done has reference to the appropriation of the goods to the particular contract. Suppose a sale of twenty sheep out of a flock, selected and marked by the vendee, and it was part of the contract that the vendor should drive them home,—would not the property pass? [*MAULE, J.* Suppose,—as, indeed, is not uncommon,—the score *of sheep are selected, and remain to be shorn by the vendor?] *457] In that case, if the vendor omitted to shear the sheep, the vendee might do it, and take away the sheep, leaving the fleece. [*MAULE, J.* It is quite clear that some portions of these trees were not the subject of the sale. The unsevered tops and sidings undoubtedly remained the property of the vendor. Can two men be seised of particular parts of an undivided chattel?] It is difficult to see why they may not. It is not unusual for two or more to be jointly interested in a race-horse: [*MAULE, J.* But, in that case, each is seised *per my et per tout*, (a) not

(a) Vide 7 Man. Gr. & Scott, 455, n.

each of an ascertained part. If the vendee had brought an action for the non-delivery of the timber, could the vendor have said he *had* delivered it, when the vendee had no right to take it away?] That would depend upon circumstances. If no bankruptcy had intervened here, and the vendor had allowed an unreasonable time to elapse without severing and delivery, would the vendee have been liable in trespass for doing as he has done? [MAULE, J. I think he would. The vendor has bound himself to do something, and has failed to do it; that is all. WILDE, C. J. There has been no appropriation, and no delivery. The case falls precisely within the principle of *Rugg v. Minett*.] In that case, there remained something to be done by the vendor, to evidence an appropriation: here, the thing sold, and the price, were ascertained. [MAULE, J. But not the quantity—the cubic contents. WILDE, C. J. In *Hanson v. Meyer*, 6 East, 614, 2 J. P. Smith, 670, by a contract of sale, the vendee agreed to purchase *all* the starch of the vendor then lying at the warehouse of a third person, at so much *per* cwt., by bill at two months: the starch was in papers, but the exact weight was not then *ascertained, but was to be ascertained afterwards; and fourteen days [*458 were to be allowed for the delivery: the vendor gave a note to the vendee, addressed to the warehouse-keeper, directing him to *weigh and deliver* to the vendee *all* his starch: and it was held, that the absolute property in the starch did not vest in the vendee before the *weighing*, which was to precede the delivery, and to determine the price; and that, notwithstanding part of the starch had been weighed and delivered by his direction, the vendor, upon the bankruptcy of the vendee, might retain the remainder, which still continued unweighed, in the warehouse, in the name and at the expense of the vendor. MAULE, J. It has repeatedly been held,—upon contracts for the sale of corn,—*Swanwick v. Sothorn*, 9 Ad. & E. 895, 1 P. & D. 648,—oil, *White v. Wilks*, 5 Taunt. 176, 1 Marsh. 2,—sugar, *Rohde v. Thwaites*, 6 B. & C. 388, 9 D. & R. 293,—hemp, *Shepley v. Davis*, 1 Marsh. 252, 5 Taunt. 617,—and flax, *Busk v. Davis*, 2 M. & Selw. 397, 1 Marsh. 258, n., 5 Taunt. 622, n.—that, although the price *per* bushel, *per* ton, or *per* cwt., and the precise bulk, are ascertained, yet the property does not pass to the vendee, so long as something remains to be done by the vendor, such as measuring or weighing.] In *Whitehouse v. Frost*, 12 East, 614, A., having forty tons of oil secured in the same cistern, sold ten tons to B., and received the price, and B. sold the same to C., and took his acceptance for the price, at four months, and gave him a written order for delivery on A., who wrote and signed his acceptance upon the order; but no actual delivery was made of the ten tons, which continued mixed with the rest, in A.'s cistern: and it was held that this was a complete sale and delivery in law *of the ten tons by B. to C., nothing [*459 remaining to be done on the part of the seller,—though, as between him and A., it remained to be measured off; and therefore that

the seller could not, upon the bankruptcy of C., the buyer, before his acceptance became due, countermand the measuring off and delivery in fact of the ten tons to the buyer C.; and that the goods were not *in transitu*, so as to enable the seller to stop them.

WILDE, C. J. The argument urged on the part of the defendant, has not succeeded in raising any doubt in my mind. It appears to me that the case is quite free from difficulty. Upon a contract for the sale of goods, so long as anything remains to be done to them by the seller, the property does not pass, and the seller has a right to retain them. In the present case, several things remained to be done. The buyer having selected and marked the particular parts of the trees which he wished to purchase, it became the seller's duty to sever those parts from the rest, and to convey them to Chepstow, and there deliver them at the purchaser's wharf. Now, that which the buyer does for the purpose of enabling the seller to perform his part of the contract, cannot be considered as an acceptance of the article. The selection and marking must, of necessity, precede the delivery. What I understand by acceptance, is, an act done by two parties, one of whom is content to deliver, and the other to receive, the subject-matter of the contract. The evidence here, is, that the seller engaged that he would sever the tops and sidings, and, after he had incurred the expense of severing, he would incur the further expense of conveying the trunks to Chepstow; and that the buyer undertook to accept the trunks when severed and delivered to him at Chepstow. That is the contract which was proved. This being the state of things, the seller becomes bankrupt; and the buyer, anxious to get *possession of the timber,—which it appears he had paid for,—goes to a place where he had no right to go, and takes upon himself to sever and carry away that which does not belong to him. The case distinctly falls within every authority upon the subject which I can remember. The property clearly had not passed to the defendant, and he was guilty of a trespass and a conversion, in possessing himself of it in the way he did. I therefore think the rule to enter a verdict for him, should be discharged.

MAULE, J. I am of the same opinion. This is an action of trover for timber which the plaintiffs claim as assignees of Swift. There is no doubt that the trees remained the property of Swift at the time of his bankruptcy, and consequently vested in his assignees, except in so far as they were divested out of Swift by the contract. The way in which the defendant seeks to show the plaintiffs to be out of possession, is this,—that the bankrupt had entered into a contract with him, by which it was agreed that certain portions of the trees in question should be severed and floated down to Chepstow by the bankrupt, and there delivered to the defendant, at the bankrupt's expense. Now, the rights of the defendant exist only so far as they are created by the contract. He had at no time a right to deal with the whole tree: it was to be severed by

the bankrupt, and the selected portion delivered to him by the bankrupt. Subject to that right, the entire property remained in the bankrupt, and passed to his assignees. How could the qualified right which the defendant had,—a right which was only to be enforced by suit,—justify him in taking the trees out of the possession of the bankrupt? Even according to his own view, the defendant was guilty of a conversion, for his act amounted to a taking of the whole tree.

*V. WILLIAMS, J. I am of the same opinion. There was nothing to show that the property in this timber ever passed to [461 the defendant. There was clearly no delivery to satisfy the statute of frauds.

TALFOURD, J., concurred.

Rule discharged.

PORCHER and Another v. GARDNER and Others. Nov. 23.

By agreement between the plaintiffs, trustees of a marriage-settlement, and the defendants, three of the committee of management of a projected railway company,—reciting that a bill for the formation of the railway was pending in the House of Commons, that the railway was intended to pass through a certain park which was subject to the settlement,—it was agreed, that, if the bill should pass into a law in the then present or the next session, the company should, within six calendar months after the passing of the bill, and before commencing the railway on any part of the said park and hereditaments, pay the plaintiffs 11,700*l.*; and that, in consideration of that sum, the company should have conveyed to them nineteen acres of the said land, &c.,—*the whole of the said agreement to be null and void, unless sanctioned by the Court of Chancery in a cause of Lawrence v. Porcher, and so much of that agreement as the court should require should be inserted in the act*:—Held, that the plaintiffs' obtaining the sanction of the court to the agreement *within six months of the passing of the bill*, was a condition precedent to their right to sue the defendants for the money.

THIS was an action of assumpsit. The declaration stated, that therefore, to wit, on the 20th of February, 1847, by a certain agreement then made between the plaintiffs of the one part, and the defendants of the other part,—reciting that a bill was then pending in the House of Commons, intituled "The Cheltenham, Oxford, and Rugby Junction Railway," &c.; and reciting that the said railway was intended to pass through Sandywell Park, and divers other hereditaments in the county of Gloucester, which were subject to the settlements made before the marriage of William Lawrence; and also reciting that the *defendants were three of the committee of management of the said rail- [462 way company, and that it had been agreed between the plaintiffs and defendants as follows,—That the plaintiffs, in consideration of 9700*l.* and 2000*l.*, to be paid to them by the said railway company, and also in consideration of the stipulations thereafter mentioned, agreed to allow the said railway to pass through the said park and hereditaments, in manner, &c.; that the defendants agreed, that, if the said bill should pass into a law in the then present or the then next session of parliament, the said company should, within six calendar months after the passing of the

bill, and before commencing the said railway on any part of the said park and hereditaments, pay to the plaintiffs the said sums of 9700*l.* and 2000*l.*; that, in consideration of the said sum of 9700*l.*, the said company should have conveyed to them nineteen acres of the said hereditaments, and that the sum of 2000*l.* should be accepted by the plaintiffs in satisfaction of all private bridges, rebuilding lodges, &c.; that the said company were to fence off with iron hurdles, and keep the same in good repair, &c.; and the whole of the expenses of making out the title, and of the conveyance, and of all other incidental charges, were to be paid by the company; *the whole of the said agreement to be null and void, unless sanctioned by the Court of Chancery, in a cause of Lawrence v. Porcher; and so much of that agreement as the court should require, should be inserted in the act;* the whole of the expenses of the plaintiffs in consequence of the said projected railway, including the proceedings in the said cause of Lawrence v. Porcher, and of the said agreement, were to be paid by the said committee of management, within fourteen days from the obtaining the sanction of the Court of Chancery. The declaration then averred, that the said agreement being so made, in consideration thereof, to wit, on, &c., and *463] that the plaintiffs, at the request of the defendants, had then promised to perform all things on their part to be performed, the defendants then promised to perform all things on their part to be performed, and that the said railway company should, within six calendar months after the passing of the said bill, pay to the plaintiffs the said sums of 9700*l.* and 2000*l.*, and should pay to the plaintiffs the whole of the expenses of making out the title to the land to be taken by the said railway company in pursuance of the said agreement, and all other charges incidental thereto; that, although the plaintiffs had duly performed all things on their part to be performed, &c., and had, from the time of making the agreement, continually, been ready and willing to permit and allow the said railway to pass through the said park and hereditaments, in the manner in the said agreement mentioned; and although the said bill, before the commencement of this suit, to wit, on, &c., being in the then present session of parliament in which the said agreement was made, did pass into a law; and although the plaintiffs afterwards, and before this suit, to wit, on, &c., did deliver to the defendants and the said railway company a good and sufficient abstract of the plaintiffs' title to the said land and hereditaments intended to be taken for the purpose of the said intended railway by the said railway company, and were, after the delivery of the said abstract, and within six calendar months after the passing of the said bill, and before this suit, to wit, on, &c., ready and willing to deduce and show, and did then show and make appear, to the defendants and the said railway company, a good and sufficient title to the said land and hereditaments, enabling them to convey to the said railway company the said land and hereditaments, on the terms aforesaid, and the plaintiffs were then, and ever since had been, and still were, ready and

willing and able to complete the said *agreement on their part, and to convey to the said railway company nineteen acres of the said land, in pursuance thereof; and although after the said agreement, and before this suit, a longer period than six calendar months elapsed after the passing of the said bill; and although the plaintiffs had, from the time the said agreement, continually, been ready and willing to accept and receive the said sum of 9700*l.*, and the said sum of 2000*l.* in full satisfaction of all private bridges, removal of lodges, &c.; and although, after the said agreement, and before this suit, to wit, on, &c., *the said agreement was duly sanctioned by the said court of Chancery*, in the said cause of *Lawrence v. Porcher*,—of all which said several premises respectively the defendants and the said railway company, after the said agreement, and after the passing the said bill, and before this suit, to wit, on, &c., had notice, and the said railway company was then requested by the plaintiffs to pay them the said sums of 9700*l.* and 2000*l.* respectively; yet the said railway company did not pay, nor had the said railway company paid, the said sums, or any part thereof; and although the defendants, afterwards, to wit, on, &c., had notice of the said several premises, and were then requested by the plaintiffs to pay or cause to be paid by the said railway company to the plaintiffs the said sums of 9700*l.* and 2000*l.*, the defendants had not paid, or caused to be paid, by the said railway company, the said sums of 9700*l.* and 2000*l.*, and the said sums of 9700*l.* and 2000*l.*, and every part thereof, were still due to the plaintiffs. The declaration then alleged for special damage, that the plaintiffs had incurred certain expenses in making out the title to the land, in preparing the conveyance, and in incidental expenses, in pursuance of the agreement,—whereof the defendants and the said railway company had notice before this *suit, and were respectively requested to pay, and which they [*465 respectively had omitted to do, &c.

The defendants pleaded,—fifthly, that, although true it was that the said agreement was sanctioned by the Court of Chancery, in the said cause of *Lawrence v. Porcher*, as in the declaration alleged, nevertheless, for plea in that behalf, the defendants said that the said agreement was not so sanctioned within, nor until after the expiration of, six calendar months after the passing of the bill in the said agreement mentioned,—verification.

Special demurrer, assigning for causes, amongst others,—that the plea was bad, because, according to the true meaning of the contract, it was not necessary that the sanction of the Court of Chancery should be obtained within the six months, and that the agreement did not become null and void at the end of the six months, although such sanction had not at that time been obtained.

Joinder in demurrer.

Gray, in support of the demurrer. The fifth plea is clearly bad. No particular time being fixed for obtaining the sanction of the Court of

Chancery to the agreement, the obtaining of such sanction was not a condition precedent: it was sufficient that it should be obtained at any time after the expiration of the six months. The case falls within the principle of *Dicker v. Jackson*, 6 Man. Gr. & S. 108. There, the declaration stated, that, on the 2d of September, 1844, the plaintiff entered into certain articles of agreement with the defendant, for the sale of a piece of land, whereby the plaintiff agreed that he would, within one month from the date thereof, or from being required so to do, deliver to the defendant an abstract of *his title to the said premises, and deduce a clear title thereto, and that the defendant did thereby agree that he would pay the purchase-money as follows,—the sum of 548*l.* 18*s.* 10*d.* on the signing of the contract, and the residue or sum of 4940*l.* 10*s.* on or before the 2d of September, 1848, together with interest, &c.: the declaration, after stating that the plaintiff did, before the commencement of the suit, and within one month from being required so to do, deliver to the defendant such an abstract of his title to the said premises, and deduce such a clear title thereto, as in and by the said articles in that behalf specified and required,—alleged for breach the non-payment by the defendant of the residue of the purchase-money: and a plea, that the plaintiff did not deliver to the defendant an abstract of title to the said premises, *and* deduce such clear title thereto, as in and by the said agreement specified and required, *modo et formâ*, &c., was held bad, inasmuch as the performance by the plaintiff of the contract with respect to delivering an abstract, &c., was not a condition precedent to his right to maintain an action for the non-payment of the purchase-money, and, consequently, that the allegation in the declaration, of such performance, was immaterial, and not traversable. The stipulation as to obtaining the sanction of the Court of Chancery, is not a condition in favour of the defendants, but is introduced solely for the benefit of the plaintiffs, who, being trustees, might render themselves personally responsible if they acted without such sanction. [V. WILLIAMS, J. When would the statute of limitations begin to run here?] In one view, from the end of the six months, the defendants being from that time liable to pay the money: in another, from the time the sanction of the Court of Chancery was obtained. In *Wilks v. Smith*, 10 M. & W. 355, the declaration *467] alleged, that, by an *agreement made between the plaintiff and the defendant, the plaintiff agreed to sell, and the defendant to buy, certain building ground, for the sum of 120*l.*, which the defendant agreed to pay the plaintiff on or before the expiration of four years, with interest at 5*l.* *per cent.* half-yearly until paid; and it averred that the four years had not expired, that the 120*l.* had not been paid, and that 12*l.* had become due for interest: and it was held that the declaration was good, and that the plaintiff was not bound to aver that he had delivered possession of the land, or that he had title thereto, or was ready and willing to convey it. PARKER, B., there says: “The consideration

for the defendant's paying the interest, is, the plaintiff's *undertaking* to sell the land, not the actual sale of it. The plaintiff is not bound to do anything before the money is paid. The rule as laid down in the notes to *Portage v. Cole*, 1 Wms. Saund. 319 l, applies strictly to this case. No time, then, being fixed by the agreement for the conveyance of the land, it cannot be a condition precedent; nor can we imply that a conveyance was intended to be made before the interest was paid, else we should be supposing that the plaintiff intended to part with his estate before the money was paid, and such an intention certainly cannot be implied from the nature of the contract." The declaration here would have been a perfectly good one, if, after setting out the agreement, it had merely averred that the bill had passed, and the six months elapsed,—without saying anything about the sanction of the Court of Chancery having been obtained.

Cowling, contra. According to the terms of the agreement, as set out in the declaration, the payment of the money was conditional on the sanction of the Court of Chancery to the conveyance being obtained. If so,—whether it be a condition precedent or a condition subsequent, the plaintiffs must fail: in the former case, the declaration is bad; in the latter, the plea is a good answer. The defendants are three of the committee of management of a projected railway company: the plaintiffs are the trustees of a marriage settlement. The defendants, at the time of entering into this agreement, were endeavouring to obtain an act of parliament to regulate their undertaking. The defendants, at the most, were only bargaining for an equity. The land was not to be conveyed until the money was paid. Under ordinary circumstances, the plaintiffs would recover upon this state of things: but the fact of the plaintiffs being trustees, makes a material difference. [MAULE, J. Is not the payment to be made absolutely on the days stipulated; the money being recoverable back, on the plaintiff's failure to make a title? In the event of no title being made, the contract would necessarily be void: that is an implied condition in every contract of sale.] If the vendors have no title, the vendees clearly are not bound to pay the money. Undoubtedly, if the one party agrees to pay the money at a particular time, without any stipulation for title, he must pay the money at the day, and rely on his doubtful remedy by a cross-action. The decision of *Wilks v. Smith* is expressly put by the court upon that ground. Here, the language of the agreement is as plain as it can be: the whole of the agreement is to be null and void, unless sanctioned by the Court of Chancery. And the obvious meaning of the agreement, is, that the sanction of the Court of Chancery shall be obtained before the passing of the bill.

Gray, in reply. A purchaser who has engaged to pay money on a given day, is bound to perform his promise, *although the vendor may not be prepared at that time to make a good title. If the

plaintiffs had no title to convey, the defendants would not be worse off than if the agreement had contained no stipulation for the obtaining the sanction of the Court of Chancery. [WILDE, C. J. By the agreement, it is expressly stipulated that the money shall be paid before the railway is commenced. That being so, if the defendants are to pay the money before a title is made, the stipulation to that effect should be clear and unambiguous. In *Dicker v. Jackson*, possession was given. Here, there is a naked stipulation for the payment of 11,700*l.*, not simply at the hazard of the title, but also at the hazard of the sanction of the Court of Chancery to the agreement, being obtained.] There is no hardship on the defendants: for an action for money had and received would lie against the plaintiffs to recover back the money, upon a failure to make a title, and to obtain the sanction of the Court of Chancery: *Wright v. Colls*, *antè*, p. 150. *Cur. adv. vult.*

WILDE, C. J., on a subsequent day (Nov. 17), said it had occurred to the court that certain questions, which had not been fully discussed on the former occasion, were very fit to be considered: and he proposed a second argument upon the following points:—

"1. Is the true construction of the agreement, that the company contracted to pay the specified amount within six months after the act of parliament should have passed, provided the Court of Chancery should within that time have affirmed the agreement,—and, if the court should not have affirmed the agreement within the six months, then to pay the amount so soon after the expiration of the six months as the *470] confirmation of the court should be obtained, provided such confirmation should be obtained within a reasonable time afterwards?" or

"2. Is the true construction of the agreement, that the company contracted to pay the amount mentioned within six months after the act should be obtained, provided within that time the confirmation of the Court of Chancery should be obtained,—otherwise, the contract to be wholly void?"

Gray, for the plaintiffs. The true meaning of the agreement is, that the plaintiffs are to have a reasonable time for obtaining the sanction of the Court of Chancery, notwithstanding the previous passing of the bill. Some proceeding in court would be necessary, in order to obtain the assent of the Court of Chancery to the agreement: and it is impossible to define precisely the time those proceedings would take. There is nothing on the face of this declaration, to show the lapse of time between the making of the agreement and the passing of the bill. In *Com. Dig. Defeasance* (A.), it is said, "A defeasance is an instrument which defeats the force or operation of some other deed, or estate. And that which in the *same* deed is called a *condition*, in *another deed* is a *defeasance*." If, therefore, the stipulation as to the obtaining the sanction of the Court of Chancery had been contained in another contract, it might have operated as a defeasance; here, it can only operate as a condition. [MAULE, J.

Have not the parties, in effect, though not in express terms, said that the whole agreement shall be void, unless the sanction of the Court of Chancery shall be obtained before the money is to become payable? It is submitted that they have not. [WILDE, C. J. Their act of parliament would be perfectly useless to the company, unless the sanction of the Court of Chancery were obtained. That, therefore, makes *it probable that the parties contemplated that the sanction should [*471 be obtained before the payment of the money.] It might be of such importance to the company to obtain immediate possession of the land, that they were content to pay the money, and take the risk of the trustees afterwards failing to obtain the sanction of the court. If such sanction were not obtained within a reasonable time, the agreement would then become null and void, and the defendants might recover back the money, as upon a failure of consideration. It is a clear rule of law, that where no time is expressly stipulated for the doing of an act, it must be done within a reasonable time. Thus, in the case of a hand-bill offering a reward for the apprehension and conviction of a criminal, the information which is to entitle a party to the reward, must be given within a reasonable time, and must not be delayed until a prosecution is fruitless. If the time be unreasonable, it lies upon the defendant to show it. This is laid down in *Hotham v. The East India Company*, 1 T. R. 688. There, a covenant in a charter-party, "that no claim should be admitted, or allowance made, for short tonnage, *unless* such short tonnage should be found and made to appear on the ship's arrival, on a survey to be taken by four shipwrights, to be indifferently chosen by both parties," was held not to be a condition precedent to the plaintiff's right to recover for short tonnage; but to be a matter of defence, to be taken advantage of by the defendants. ASHHURST, J., there says: "There are no precise technical words required in a deed to make a stipulation a condition *precedent* or *subsequent*: neither does it depend on the circumstance whether the clause is placed prior or posterior in the deed, so that it operates as a proviso or covenant: for, the same words have been construed *to operate as either the one or the other, according to the nature of the transaction. The right of action, once vested, was [*472 only capable of being divested by a subsequent *non-feasance*, viz. by not taking the proper steps to procure a survey after the arrival of the ship in the river Thames. This, therefore, being a circumstance, the omission of which was to defeat the plaintiff's right of action, once vested, whether called by the name of a proviso by way of defeasance, or a condition subsequent, it must in its nature be a matter of *defence*, and ought to be shown by the defendants."

Cowling, contra. The construction suggested by the second question proposed by the court, is the correct one, with an exception that does not apply to this case, viz. the obtaining the sanction of the Court of Chancery within six months. The 9700*l.* and 2000*l.* are payable the moment

the bill passes: the six months are given as mere days of grace. Possibly the parties may have thought that similar days of grace were allowed for obtaining the sanction of the Court of Chancery: if they did, it is safer to say, *quod voluerunt non dixerunt*. It appears, upon the face of the declaration and the plea, that such sanction of the Court of Chancery was not obtained until after the lapse of six months. [MAULE, J. The agreement, by the terms of it, was to be null and void, if the sanction of the Court of Chancery was not obtained within six months after the passing of the act. To make it so, you must deprive it of all operation: and yet it may have had the operation of compelling the company to pay the money before such sanction was obtained.] In *Thicknesse v. The Lancaster Canal Company*, 4 M. & W. 472, a company was empowered by an act of parliament to make a canal within certain limits, without specifying any time within which it was to be *completed*⁴⁷³: and it was held that no limitation as to time could be assigned to the powers conferred, by an intendment that they were to be exercised within a *reasonable time*, and consequently that the works might be resumed at any period. Time, when specified, and of the essence of a contract, is not to be extended to a reasonable time: *Stowell v. Robinson*, 3 N. C. 928, 5 Scott, 196.(a) [MAULE, J. The reasonable time is sought to be applied here, upon the supposition that no time is mentioned, either in express terms, or by implication.] The question, then, is, whether the parties have, in substance, though not in express terms, said that the sanction of the Court of Chancery is to be obtained within a reasonable time. In *Worsley v. Wood*, 6 T. R. 710, by the proposals of the Phoenix Insurance Company, it was stipulated that "persons insured shall give notice of the loss forthwith, deliver in an account, and procure a certificate of the minister, churchwardens, and some reputable householders of the parish, importing that they knew the character, &c., of the assured, and believed that he really had sustained the loss, and without fraud: and it was held,—reversing the judgment of this court,(b)—that the procuring of such a certificate was a condition precedent to the right of the assured to recover, and that it was immaterial that the minister, &c., wrongfully refused to sign the certificate. Lord KENYON there says: "If there be a condition precedent to do an impossible thing, the obligation becomes single: but, however improbable the thing may be, it must be complied with, or the right which was to attach on its being performed, does not vest. If the condition be that A. shall enfeoff B., and A. do all in his power to perform the condition, and B. *will not receive livery of seisin, yet, from the time of Lord COKE to the present moment, it has not been doubted but that the right which was to depend on the performance of that condition, did not arise." [WILDE, C. J. This question often arises upon certificates of surveyors

(a) And see *Duncan v. Topham*, ant², p. 225.

(b) *Wood v. Worsley*, 2 H. Blac. 574; 3 Wentw. Plead. 337.

under building contracts.] *Morgan v. Birnie*, 9 Bingh. 672, 3 M. & Scott, 76, was a case of that sort. There, the defendant was to pay for a certain building, upon receiving an architect's certificate that the work was done to his satisfaction. The architect checked the builder's charges, and sent them to the defendant: and it was held that this did not amount to such a certificate of satisfaction as to enable the builder to sue the defendant, although the defendant had not objected to pay on the ground that no sufficient certificate had been rendered. Whether the obtaining the sanction of the Court of Chancery was a condition precedent or subsequent, depends upon the language of the instrument. And here, the language is much more clear to show that a condition precedent was contemplated, than it was in *Worsley v. Wood*. There is no averment that a reasonable time had elapsed; and therefore, even if the argument on the other side be correct, the declaration would be clearly bad: *Stavart v. Eastwood*, 11 M. & W. 197. In *Hotham v. The East India Company*, the making a claim for short tonnage, was a condition subsequent, and therefore it was not necessary to aver performance in the declaration.

Gray, in reply. In *Worsley v. Wood*, the certificate was, in express terms, required to be obtained. There would be no absurdity in holding that the company were bound to pay the money before the sanction of the Court of Chancery was obtained. It might have *been of great advantage to them to obtain immediate possession of the [*475 land, even though such possession should have been but temporary.

WILDE, C. J. The declaration in this case states, that, by an agreement made on the 20th of February, 1847, between the plaintiffs and the defendants,—reciting, that a bill was then pending in the House of Commons, intituled “The Cheltenham, Oxford, and Rugby Junction Railway,” that the railway was intended to pass through Sandywell Park and other hereditaments in the county of Gloucester, which were subject to certain settlements made before the marriage of William Lawrence, that the defendants were three of the committee of management of the said railway company, and that it had been agreed between the parties, that, in consideration of 9700*l.* and 2000*l.* to be paid to the plaintiffs by the company, and also in consideration of the stipulations thereafter mentioned, the said railway should be allowed to pass through the said park and hereditaments,—the defendants agreed, that, if the said bill should pass into a law in the then present or the then next session of parliament, the company should, within six calendar months after the passing of the bill, and before commencing the said railway on any part of the said park and hereditaments, pay to the plaintiffs the said sums of 9700*l.* and 2000*l.*: and, after setting forth certain other stipulations which it is unnecessary further to advert to, it was provided, that “the whole of the said agreement should be null and void, unless sanctioned by the Court of Chancery in a cause of *Lawrence v. Porcher*; and that so much of that agreement as the court should require,

should be inserted in the act:" and then follow certain provisions with regard to the expenses incurred in that cause, and the expenses of the agreement. The declaration then, after averring mutual *promises, *476] &c., alleged for breach, that, although the plaintiffs had always been ready and willing to permit the railway to pass through the said park and hereditaments, and although the said bill did in the then present session of parliament pass into a law, and although the plaintiffs did deliver a good and sufficient abstract of their title to the said land and hereditaments intended to be taken for the purpose of the said intended railway, and were, after the delivery of the said abstract, and within six calendar months after the passing of the said bill, ready and willing to deduce, and did deduce, a good and sufficient title, &c., and were ready to convey the land, and although the said agreement was duly sanctioned by the Court of Chancery in the said cause of *Lawrence v. Porcher, &c.*, yet the company did not pay the 9700*l.* and 2000*l.*, or any part thereof, &c.

In answer to this declaration, the defendants have pleaded, that, although true it was that the said agreement was sanctioned by the said Court of Chancery in the said cause of *Lawrence v. Porcher*, as in the declaration alleged, yet that the said agreement was not so sanctioned within, nor until after the expiration of, six calendar months after the passing of the said bill in the said agreement mentioned.

To that plea the plaintiffs have demurred specially: and, upon the argument before us, the questions which were mooted, were,—whether the obtaining of the sanction of the Court of Chancery to the agreement, was a condition precedent to the right of the plaintiffs to maintain an action to recover the two sums of 9700*l.* and 2000*l.*,—or, if a condition precedent, within what time,—or whether it was a condition subsequent.

The principles which govern the courts in construing agreements of this sort, are well known, and are not now disputed. The question is, taking the whole instrument together, what is fairly to be inferred from its *language to have been the intention of the parties,—whether *477] it was, that the sanction of the Court of Chancery should be obtained before the money should be due and payable,—and whether or not such sanction was to be obtained within a limited time. It seems to me that the true construction of the agreement is, that the obtaining the sanction of the court was a condition precedent, and that such sanction should be obtained before any right of action should arise to the plaintiffs, and at least within six months; and therefore that the defendants are entitled to the judgment of the court upon this demurrer.

Looking at the whole of the agreement, it appears that the vendors (the plaintiffs) are trustees. The company would require a good equitable as well as a legal title to the land that was to be conveyed to them. There is a material distinction between this and most of the cases where the purchase-money has been held to be payable before the title is shown or the conveyance executed. I think wherever it is contended that the

true construction of the agreement is that the purchase-money is to be paid before the title can be ascertained, the terms of the instrument should be so plain and express as to leave no doubt that such was the intention of the parties,—that the purchaser contemplated parting with his money at the risk of being able to recover it back upon the vendor's failing to make out a good title. Here, the agreement, upon the face of it, shows that the vendors had not a title to convey,—that something was necessary to enable them to make a title, viz. the sanction of the Court of Chancery. When a party enters into a contract of purchase with trustees, with notice that they are so, he buys subject to all the trusts, and may be deprived in equity of all benefit from the agreement. This, therefore, is a case in which it not only appears upon the face of the agreement that *the vendors have no title, but also that they are about to proceed to acquire a title; and that, whether they will [*478 ultimately have a title to convey or not, depends upon the discretion of the Court of Chancery,—a discretion which will be governed by circumstances which may be wholly beyond the power or control of the parties or either of them. Looking at the object of the purchasers,—who represent a railway company,—it is impossible to shut one's eyes to the inconveniences attending the construction which has been contended for on the part of the plaintiffs. The failure to obtain a good title to the nineteen acres which are the subject of this agreement, might be destructive of the whole undertaking. The company could not venture to work upon this part of the line: neither could they, in this state of uncertainty as to their being able to obtain a conveyance of the nineteen acres in question, with any advantage proceed with the construction of any other part of the railway. The parties agree, that, in order to carry into effect their contract, it is necessary to have the sanction of the Court of Chancery: and they expressly provide that the whole agreement shall be null and void unless such sanction is obtained,—using terms as strong as could be used, to show the object they had in view. Then, the 11,700*l.* is stipulated to be paid within six months after the passing of the bill; and it is further stipulated that so much of the agreement as the Court of Chancery should require, should be inserted in the act. This latter stipulation could not be complied with if the bill passed before the sanction of the court could be obtained. It is plain that the parties contemplate no longer a period for the payment of the money, than six months after the passing of the act. That being so, at what time is it reasonable to suppose they contemplated that it should be ascertained whether it was a bargain or not? At all events, before the money was *paid; and that is, as I have before observed, within six months [*479 after the passing of the bill. I cannot imagine any inducement on the part of the purchasers to pay the money before the sanction of the Court of Chancery should be obtained. It is suggested that it might have been important for the company to do something upon the agreement, before

such sanction was obtained: but I can see no advantage they could possibly acquire under the agreement before the vendors were in a situation to convey the land; and the terms are express, that the purchasers should have no right under the agreement, unless it was sanctioned by the Court of Chancery. I therefore think the fifth plea sets up a good matter of bar,—the non-performance of a condition precedent to the right of the plaintiffs to sue for the money; and that the defendants are entitled to judgment upon this demurrer.

MAULE, J. I also am of opinion that the defendants are entitled to judgment on the demurrer to the fifth plea. The true construction of the agreement declared upon, regard being had to the subject-matter, and to the relative position of the respective parties,—the plaintiffs being trustees under a marriage-settlement, and the defendants representing a projected railway company,—appears to me to be this:—The parties are aware, that, although they have agreed as to the terms on which the land is to be sold, it may be that the contract is one which they will be unable to complete. They therefore contract, as it were *de bene esse*, for the payment of the purchase-money on the one side, and the conveyance of the land on the other side, in the event of the Court of Chancery lending its sanction to the agreement,—both parties being well aware that they cannot otherwise carry into effect the objects they have in view. What they say, is, in substance, *this,—“If the sanction of the Court *480] of Chancery to the present agreement is not obtained, no part of it shall bind us.” If they had said so in terms, there could have been no doubt at all about it. Looking at the whole of the agreement, and the surrounding circumstances, as disclosed on the face of the declaration, it appears as clearly to my mind that such was the agreement of the parties, as if they had said it in the most plain and direct terms. It has been suggested by Mr. *Gray* that the company might be content to pay the money at once, in consideration of obtaining immediate possession of the land, even though they might ultimately fail to obtain a title. I cannot conceive that that could have been the contemplation of the parties: but I think the true construction of the agreement is, as I have already stated, that, until the sanction of the Court of Chancery is obtained, neither party shall have any right to enforce its provisions against the other. If we were to hold the plaintiffs to be in a condition to call upon the company to pay the 11,700*l.*,—the six months after the passing of the bill having elapsed,—before the sanction of the Court of Chancery to the sale of the land had been obtained, it might turn out, after judgment recovered, and execution executed, that that had taken place upon the happening of which the parties had expressly agreed that the contract should have no operation at all. That would be to decide, that, in an event in which the parties have provided that the agreement shall be *nudum pactum*, it shall be operative in a most important particular, and to the entire extent of what is provided to be done on one side, viz. the payment of a large

rum of money. It is true that there are cases where a stipulation that a contract shall, in a given event, be altogether null and void, means, not that it shall be *wholly* null and void, but only that it shall be null and void from the time of *the happening of the event contemplated: [*481 as, for instance, in the case of a lease, where there is a proviso that it shall be null and void in case of any breach of covenant; the lease there cannot be *wholly* null and void; it must operate as a valid lease, creating the relation of landlord and tenant between the parties, until the happening of the event which is to make it void. In that case, the real meaning of the expression is, that, upon the happening of the contingency provided for, the term shall cease and determine. That is putting a construction upon words contrary to their natural and ordinary meaning, in order to give effect to the manifest intention of the parties. Here, no difficulty of that sort presents itself. The clear and unambiguous intention of the parties was, that neither should be bound by the contract, unless it should receive the sanction of the Court of Chancery. The whole substance of the contract on the one side, is, the payment of the money: and, in the event of the sanction of the Court of Chancery not being obtained, there is no kind of consideration on the other side. I think, therefore, it is abundantly clear that this is an agreement which was to take effect only upon the happening of an event which has not happened; and therefore that the declaration discloses no cause of action.

V. WILLIAMS, J. I am of the same opinion. The contract provides that all shall go for nothing, unless the sanction of the Court of Chancery is obtained: but it is altogether silent as to the time at which such sanction is to be obtained. It is obvious that there must be some limit; and the question is what that limit is to be implied to be. For the purpose of the present case, it is, in my opinion, enough to say that it cannot exceed the time within which the defendants might, by the terms of the agreement, be called upon by the plaintiffs *to pay the money, [*482 viz. six months after the passing of the bill. The event contemplated by the parties not having taken place, it seems to me that the agreement cannot be made the subject of an action, and consequently that our judgment must be for the defendants.

ALFOURD, J. I am of the same opinion. It appears to me that the whole consideration for the payment of the large sum of money which the plaintiffs seek to recover in this action, is nothing of value, unless the sanction of the Court of Chancery should have been obtained. That was perfectly well known to both parties at the time of entering into the agreement. When, therefore, the six months from the time of the passing of the act had passed by without the sanction of the Court of Chancery being obtained, the plaintiffs' right to demand the 11,700*l.* was gone. The parties must necessarily have intended that the sanction of the Court of Chancery should be obtained within the period stipulated

for the payment of the money, inasmuch as, without it, there would be a total failure of consideration. We are, therefore, justified in reading the agreement as if those words had been actually introduced into it: and, so reading the agreement, no right of action has arisen upon it.

Judgment for the defendants.

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*GIBBONS v. VOULLON. Nov. 16.

A., a trader, entered into an arrangement, by deed, with his creditors, by which it was agreed that he should have a letter of license for five years, during which period he should carry on the trade under the inspection of certain persons therein named; and it was provided, that, if any creditor should, during the continuance of the license, *molest or interfere with A.*, contrary to the true intent and meaning of the indenture, A. should thenceforth be relieved, exonerated, acquitted, and discharged of and from all debts and demands of the creditor by whom the letter of license should be so contravened, *and that the said indenture should or might be pleaded in bar to such respective debts or demands accordingly:—*

Held, that the bringing of an action by a creditor, party to the deed, within the five years, was a "*molestation or interference*" with A., within the meaning of the proviso; and that the indenture operated as a *defence*, and was pleadable in bar as such.

DEBT, for interest, and for money due upon an account stated.

The defendant pleaded, that, after the contracting of the said debts, and before the commencement of this suit, to wit, on the 17th of May, 1843, by indenture then made between the defendant of the first part, A. B., C. D., and E. F., of the second part, and the plaintiff and divers other persons, therein described as creditors of the defendant, of the third part,—reciting, that the defendant had for some time past carried on the business of a silk-mercator; that the several debts due unto the parties thereto of the second and third parts, which were set opposite to their respective names, had accrued due; that the defendant was unable immediately to satisfy the said debts; and that it was considered, that, with a view to the gradual realization of his effects, it would be more advantageous to all parties interested, that the defendant should, for the period of five years, be permitted to carry on the said business under the inspection of the said A. B., C. D., and E. F.,—it was agreed that the business which had been so carried on by the defendant should thenceforth be carried on under the superintendence of inspectors on behalf of the

*484] said creditors, for the term of five years from the day of the **date* of the said indenture, or until the inspectors should deem it expedient to wind up the said business under the provision in such behalf thereafter contained, or until the letter of license thereafter granted, should be revoked: That, in pursuance of the said recited agreement, the said several persons parties thereto of the second and third parts, did, by the said indenture, give and grant unto the said defendant, until the 17th of May, 1848, or until the license by the said indenture granted should have been determined under the provisions thereafter contained,

full and free license and authority to pass and repass to and from, and reside in, any place where the nature of the business might require, and to carry on the said business, and to collect and dispose of the estate and effects of the defendant under the superintendence of the inspectors for the time being ; and, further, that, if any of the said persons parties thereto of the second and third parts, or the co-partners, executors, administrators, or assigns of any of them, should, at any time thereafter during the continuance of the license thereby granted, *molest or interfere with the defendant, contrary to the true intent and meaning of the said indenture*, then and in that case, and thenceforth, the defendant, and his heirs, executors, administrators, and assigns, should be relieved, exonerated, acquitted, and for ever discharged of and from all debts and demands whatsoever which were then due unto, or then could be made by, the creditor or creditors respectively by whom the said letter of license thereinbefore contained, should in any such respect be contravened, and of and from all manner of actions, suits, damages, costs, charges, expenses, and claims, by reason, on account, or in consequence of the same debts or demands respectively, and that the said indenture should or might be pleaded in bar to such respective debts or demands accordingly,—as by the *said indenture would appear: That, after the contracting of the said debts, and before the commencement of this suit, to wit, [*485 on, &c., the plaintiff signed, sealed, and as his act and deed delivered the said indenture to the defendant as, and then became and was, a party thereto of the third part ; and, at the time of the plaintiff's so executing and delivering, and becoming a party to, the said indenture, the plaintiff was a creditor of the defendant for and in respect of the said debt in the declaration mentioned, and not otherwise ; and the plaintiff so executed and delivered, and became a party to, the said indenture, as a creditor for and in respect of the said debt, and for and in respect of the causes of action in the declaration mentioned, and not otherwise,—profert of the indenture : Averment, that the said term of five years in the said indenture mentioned, had not expired at the time of the commencement of this suit, and that the defendant had performed all things in the said indenture contained on his part to be performed ; and that, after the making of the said indenture, and during the continuance of the license thereby granted, and whilst the debts in the declaration mentioned were due to the plaintiff, to wit, on, &c., *the plaintiff did molest and interfere with the defendant, contrary to the true intent and meaning of the said indenture, by then instituting and commencing this suit against the defendant*, and, by means of the premises, then released, exonerated, acquitted, and for ever discharged the defendant of and from the debt, damages, and causes of action in the declaration mentioned, and of and from all actions, suits, damages, costs, charges, expenses, and claims, by reason, on account, or in consequence of the said debt, according to the true intent and meaning of the said indenture,—verification.

General demurrer, and joinder.

*486] *Willes, in support of the demurrer.(a) 1. The suing out of a writ within the stipulated period, is not a molestation within the terms of the covenant. The plea, therefore, is bad. The averment that the plaintiff "did molest and interfere with the defendant, contrary to the true intent and meaning of the indenture, by instituting and commencing this suit against the defendant," would be proved by showing that a writ was issued, and nothing more: *Harris v. Mantle*, 3 T. R. 307. The plea should have gone on to allege in what manner the defendant was molested or interfered with. The writ may have been issued merely for the purpose of saving the statute of limitations; or, a *nolle prosequi* may have been entered. [MAULE, J. Must we not assume that the suit was commenced for the purpose of molesting and interfering with the defendant? An action is usually brought for the purpose of obtaining judgment and execution.]

*487] 2. The molestation and interference set up by the *plea, being the suing out a writ, the defence, if it be one, arose after action brought, and therefore should have been pleaded to the further maintenance of the action.

3. The proviso in question being contrary to a rule of law, it cannot operate as a release. Assuming,—as, indeed, was expressly held in *Ford v. Beech*, 11 Q. B. 852, in error,—that a covenant not to sue for a given time, cannot be pleaded in bar; the question here will be, whether, the general intention of the parties being to keep alive the debt, any form of words, the practical effect of which will be to prevent the creditor from suing within the time, can be regarded. The foundation of the decision in *Ford v. Beech* was this, that if the deed barred or suspended the creditor's remedy for any period, however short, the effect would be a total release of the debt; and therefore the court construed the agreement as giving the defendant merely a right of action for breach thereof if the plaintiff sued while the payments were continued. [MAULE, J. Is there anything to prevent a release from being made to operate *in futuro*, if the parties so intended? If that *may* be done, can more correct words be framed for the purpose than those here used?] It may

(a) The points marked for argument on the part of the plaintiff, were as follows:—"That it is not shown, except by way of inference, that the bringing of an action by the plaintiff against the defendant, is a molesting or interference, within the provisions of the covenant; that the molesting against which the covenant provides, must mean such molesting as would prevent the defendant from doing that which the plaintiff by the deed licenses the defendant to do; that the plea does not show with certainty how the bringing of the action so molested the defendant; that, if the bringing of the action is a molesting within the covenant, then the covenant (as, by the deed, a debt is declared to be due to the plaintiff, while, by the covenant, the recovery of the debt is declared to be suspended for five years) amounts to a covenant not to sue during that period, which cannot be the case, as the deed is clearly intended to provide means for the satisfaction of the debt, which it clearly would not do, if it suspended the debt, and thereby caused a release by operation of law; and that the covenant, supposing it to amount to a covenant not to sue for the debt for five years, cannot be pleaded in bar, but, if available to the defendant, is available only in an action to recover damages for breach of the covenant."

be that this is good as a defeasance. [MAULE, J. If it destroys the debt, it is a good answer to the action, by whatever name it may be called. V. WILLIAMS, J. Is there any difference between a defeasance and a condition, except that the one is in the same, and the other in a different instrument?](a) WILDE, C. J. A covenant not to sue does not operate as a release. But here you have agreed, that, if you do sue, a release shall come *into operation. The mere addition of something as a consequence, does not alter the legal operation of the instrument.] [*488 The effect of this deed, if it operates at all as a release, is, to make it operate as an *immediate* release. [MAULE, J. May there not be an effective stipulation to put an end to a debt?] That would be a defeasance: and it is not so pleaded. Either this must be taken to be an immediate discharge of the debt, or the court must say that the parties have attempted to do what cannot be done, viz. to suspend the debt for five years, and then revive it. [MAULE, J. You are seeking to enforce a construction of the deed which is manifestly contrary to the intention of the parties. Is there any inconsistency in an agreement to suspend a present debt for a given period? WILDE, C. J., referred to *Kearslake v. Morgan*, 5 T. R. 513, and *Stracey v. The Bank of England*, 6 Bingh. 754, 4 M. & P. 639.] The case of a negotiable security is an exceptional case: *James v. Williams*, 13 M. & W. 828, 833. It would be unjust to the debtor to allow his creditor to sue him whilst the bill was outstanding. [WILDE, C. J. Suppose the bill is not negotiable?] In that case, it clearly operates no suspension. [MAULE, J. If the thing which the parties agree to do here, may be done for one consideration, why may it not for another?] The principle upon which the cases proceed, is referable to the law-merchant. [MAULE, J. The case of a bill of exchange is complicated with some difficulties. But, is there anything unlawful in giving an extended credit for five years?] It is adding a new incident to a chose in action. A creditor cannot bind himself not to sue for a debt for a limited period, except by taking a negotiable security. In *Stracey v. The Bank of England* there was no suspension of the right of action. When once a right of action has accrued, there is no mode by *which the creditor's right can be got rid of, but [*489 accord and satisfaction, and release. [V. WILLIAMS, J. Is it inconsistent with the character of a chose in action, that, on the happening of a given event five years hence, the debt shall be discharged?] In that case, there would be no suspension of the debt until the happening of the event contemplated. [V. WILLIAMS, J. A legacy is in the nature of a chose in action. Suppose a legacy, with a condition that it

(a) In T. 21, H. 7, fo. 24, pl. 15, *FINEUX*, C. J., points out the different operation of a condition and a defeasance, viz. that a condition which is repugnant to the obligation to which it is annexed, is merely void, and the obligation stands; but that, where there is a defeasance which is repugnant to an antecedent obligation, the defeasance stands, and the obligation is avoided.

should be void if the legatee filed a bill for it,—would that be bad?] Possibly not. [V. WILLIAMS, J. In *Cooke v. Turner*, 15 M. & W. 727, such a condition in a devise of real estate, was held to be valid.] A prospective right of action may be waived; as in *King v. Gillett*, 7 M. & W. 55, where, to a declaration in assumpsit founded on mutual promises to marry within a reasonable time, it was held to be a good plea, that, after the promise, and before any breach thereof, the plaintiff absolved, exonerated, and discharged the defendant from his promise, and the performance thereof. *Stracey v. The Bank of England* is expressly overruled by *Ford v. Beech*. [WILDE, C. J. It was not so intended: I wrote the judgment in *Ford v. Beech*; and I remember I had a very long discussion with one of my learned brothers upon it.] The plaintiff there clearly could have had no right of action until he called for a transfer of the stock. In *Thimbleby v. Barron*, 3 M. & W. 210, it was held that a covenant not to sue upon a simple contract debt for a limited time, is not pleadable in bar of an action for such debt,—the learned counsel who there sought to uphold the plea, being told by the court that the books were full of authorities against him. [TALFOURD, J. The court of error, in *Ford v. Beech*, seem expressly to contemplate this case. PARKE, B., in delivering the judgment, says (11 Q. B. 872): *490] “In 1 Roll. Abr. *939, tit. *Extinguishment* (L), pl. 2,(a) it is said that, ‘if the obligee grants to the obligor that he shall not be sued or vexed upon the said obligation before such a day, and, if he is, then that he shall plead the said grant as an acquittance, and that the obligation shall be void and of none effect, this is a suspension of the debt, and by consequence a release.’ It must be observed, that, in that case, it was expressly covenanted, that, in the event of the covenantor suing upon the obligation, contrary to his covenant, the obligation should be void, and that the obligor or covenantor should plead the covenant as an acquittance, which, by consequence, was a release: the covenant in that case, therefore, went much beyond a mere covenant not to sue.”] On referring to the passages in the Year Books upon which Rolle founds himself,(b) it will be found that the debt there is held to be gone at once.(c) [TALFOURD, J. *Ayloff v. Scrimshire*, Carth. 63,(d) is an authority against you.] That case presents different aspects, according to the book in which it is reported. In the reports in Holt and in Shower, the deed is stated to have had the very same provision that is found here. [V. WILLIAMS, J. Shower states as the principal case, what Comberbach states as an illustration.] In Carthew it is somewhat

(a) Translated, 11 Vin. Abr. 461.

(b) T. 21 H. 7, fo. 23, pl. 15, in B. R.: and see post, 494 (a).

(c) The obligation was held, by FINEUX, C. J., and TREMAILE, J., the only judges mentioned, to be avoided by the defeasance, upon the happening of the event contemplated by the defeasance, namely, the putting of the obligation in suit before the feast of St. Michael.

(d) Also reported as *Ayliff v. Scrimshire*, 1 Show. 46, Anon. Comb. 123, *Ayloff v. Scrimshaw*, 2 Balk. 573, *Ayliff v. Scrimshire*, Rep. temp. Holt, 619, 3 Danv. Abr. 437.

differently reported: and the note at the end of the case,—upon which, no doubt, reliance will be placed on the other side,—is evidently a mistake. [WILDE, C. J. Carthew professes to be setting out the terms of the covenant; which the other reporters do not. MAULE, J. Littleton, *§ 467, and the commentary thereon,(a) show that a man may release upon condition; though not for a limited period.] Little- [*491
ton and Coke are there treating of rights other than rights of action. In *Carvil v. Edwards*, 1 Show. 380, S. C. (per nom. *Carvell v. Edwards*) Carth. 210, Rep. temp. Holt, 546, it was held, that, to debt on bond, by an executor, the defendant cannot plead *in bar*, that the testator and other creditors of the defendant entered into a letter of license with him, in which they covenanted and agreed not to sue him within such a time, on pain of forfeiture; for, it does not amount to a *release* of their debts.

Hugh Hill, contra.(b) 1. It is said that the suing out a writ within the five years, is not a molestation within the meaning of the covenant set out in the plea. This is, it is to be observed, a deed not entered into between the plaintiff and the defendant only; but a deed to which several other persons, creditors of the defendant, are parties, and executed by each creditor upon the faith of all the others being assenting parties, and bound thereby. The object and intention of the deed plainly appear from the recital,—that the defendant was unable immediately to satisfy his debts, and that it was considered, that, with a view to the gradual realization of his effects, it would be more advantageous to all parties interested, that the defendant should, for the period of five years, be permitted to carry on his business under the inspection of certain persons therein named: and, accordingly, it was agreed that the defendant should have a letter of license for that period; and then comes the proviso, that, if any of the creditors should, at any time thereafter during the continuance of *the license thereby granted, *molest or* [*492
interfere with the defendant, contrary to the true intent and meaning of the said indenture, then, and in that case, and thenceforth, the defendant, his heirs, &c., should be relieved, exonerated, acquitted, and for ever discharged, of and from all debts and demands whatsoever which were then due unto, or then could be made by, the creditor or creditors respectively by whom the said letter of license thereinbefore contained, should in any such respect be contravened, &c. It is difficult to conceive what that means, unless it means a molestation or interference by bringing an action.

2. With respect to the form of the plea, it is to be observed that there is no special demurrer on the ground that the commencement is improper: and, if there were anything in the objection, it is answered by the

(a) Co. Litt. 274 a, 274 b.

(b) The points marked for argument on the part of the defendant, were as follows:—"That the covenant set forth in the plea is a good defence to the action; for, on the molestation taking place, the covenant became absolute, and operated as a release; and that the bringing of this action is a molestation within the meaning of the terms of the covenant."

case of *Le Bret v. Papillon*, 4 East, 502. There, one who was an alien *amy* at the time of the action brought, became an alien *enemy* before plea pleaded: the defendant pleaded, that the plaintiff ought not to *have or maintain* his action, because he was, before *and at the time of exhibiting his bill*, and *now is*, an alien *enemy*, &c., concluding that therefore the plaintiff ought to be barred from *having or maintaining his action*, &c.: to this plea the plaintiff replied, that, *at the time of exhibiting his bill*, he was an alien *amy*, wherefore he prayed judgment and his damages: it was held, on demurrer, that the plea was ill pleaded: but yet, as the court were *ex officio* bound to give such judgment as appeared upon the whole record to be proper, without regard to the issues found or confessed, or to any imperfection in the prayer of judgment on either side; and, as it appeared upon the whole that the plaintiff was now an alien *enemy*, and therefore incapable of maintaining further his suit, judgment was given that he *be barred from further having or maintaining his action*.

*493] *3. It is then said that the covenant in question is not pleadable in bar to an action for one of the debts mentioned in the deed; but, at most, only gives ground for a cross-action, or for a bill in equity. The bringing of this action is not merely a violation of the covenant which the plaintiff has entered into with the defendant; but it is also a breach of faith with every one of the other creditors who were parties to the arrangement. It clearly, therefore, cannot be the subject of a cross-action, the damages in which would not be commensurate with the injury. A covenant between A. and B., not to sue for a limited time, is not the proper subject of a plea in bar: but, if the deed declares the debt to be forfeited if sued for within the time, and enables the debtor to plead it, it does operate as a bar. This is distinctly laid down in 1 Roll. Abr. 989, tit. *Extinguishment* (L), pl. 1, 2:(a)—“Si l'obligee covenant ove l'obligor que est lie a performer covenants, nemy a luy molester ou suer luy devant tiel jour, ceo nest ascun suspension del dett, car le proper sense del paroll est d'aver covenant sur ceo sil luy sue devant le jour, et nemy a faire ceo un relea.(b) Si l'obligee grant al obligor quil ne serra sue nec vex sur le dit obligation devant tiel jour, et,*494] sil soit, que donque il pledera le dit grant come un acquittance, et que le dit obligation serra void et de nul effect, *ceo est un sus-

(a) Translated, 11 Vin. Abr. 461, and antè, p. 490.

(b) Citing *Dowse v. Jeffreys*. The case of *Deux v. Jefferies*, Cro. Eliz. 352, is as follows:—“Debt, upon an obligation. The defendant pleads that the plaintiff, by indenture, did covenant that he would not sue the bond before Michaelmas, and thereupon demanded judgment, *si actio*, &c., intending that the action, being suspended for that time, was gone for ever. It was thereupon demurred, and argued by *Fleming* for the plaintiff, and by *Drew* for the defendant, and 21 H. 7, fo. 24, and 4 H. 7, fo. 6, were cited. But the court, without further argument, resolved for the plaintiff; for, it is only a covenant, and shall not enure as a release: and it is not to be pleaded in bar, but the party is put to his writ of covenant, if he sued before the time. But, if it had been a covenant that he would not sue it at all, then peradventure it might enure as a release and to be pleaded in bar, but not here; for, it never was the intent of the parties to make it a release. And it was adjudged for the plaintiff.” S. C. Anderson, 307.

pension del obligation, et issint per consequens un reles,—car ceo est un grant,—et que il ceo pledera come un acquittance.”(a)

There is a singular diversity in the reports of *Ayliffe v. Scrimshire*. In the reports in *Carthew* and in *Salkeld*, it is stated simply as a covenant not to sue for a limited time. In the former, the very case now before the court is put in the most pointed manner:—“Nota. In the argument of this case, it was allowed by all, that a letter of license containing the words following, viz., that, if the creditor sue, &c., within such a time, that his debt shall be forfeited, such license is pleadable in bar: therefore, in the principal case, the covenant being temporary, and limited to a certain time, and there being no words in the deed of defeasance to make the debt forfeited, upon a suit commenced, &c., the court was clear in opinion it was not pleadable in bar, but that an action of covenant was his proper remedy.” In *Comberbach* the report runs thus:—The defendant pleaded that the plaintiff, after the money was due on the bond, covenanted and granted, by indenture, not to sue the defendant in ninety-nine years; to which the plaintiff demurred. And *HOLT*, C. J., said, “that the suspension of this action will not destroy the bond, for, every defeasance is *quodammodo* a suspension: that a covenant not to sue at all is an acquittance, but a covenant not to sue a bond within such a time, goes only in covenant: that the rule that a personal action once suspended is for ever extinct, doth not hold in all cases.” And *DOLBEN* agreed. Shower, in his report of *Carivil v. Edwards*, 1 Show. 380, concludes with an *adjournator*: “and he does not, in his argument, cite *Ayliffe v. Scrimshire*; [*495 which occurred but two years before, and which, as reported by himself, was, if correct, a distinct authority in his favour. *Tatlock v. Smith*, 6 Bing. 389, 8 M. & P. 676, is a very strong authority in favour of the defendant. There, by an agreement between the defendants and their creditors, all the defendants’ stock in trade was placed in the hands of trustees for the benefit of the creditors, and the defendants were to execute to the trustees a conveyance of all their estate,—in which deed were to be inserted all other usual clauses. The trustees carried on the defendants’ business, and paid the creditors 10s. in the pound: they then tendered for execution by the defendants, a conveyance of all their estate, containing a clause of release, which the defendants objected to as insufficient, and refused to execute the conveyance: the instrument not having been executed by all the creditors, a meeting at which the defendants were called on to execute, was adjourned, in order that the signature of every creditor might be obtained: and it was held that the plaintiffs, who, as creditors, were parties to the above agreement, could not sue for their original debt, at least until the conveyance, such as it was, had been executed by all the creditors, and refused by the defendants. Richard-

(a) Citing the Year Book, 21 H. 7, fo. 23 b; which case is also abridged, Bro. Abr. titles *Barre*, pl. 52, *Defeasance*, pl. 15, 16, *Grants*, pl. 58.

son v. Rickman, B. R. M. 16 G. 3, is cited in *Kearslake v. Morgan*, 5 T. R. 517, as the first case in which it was held that the giving a negotiable instrument was pleadable in bar. In 2 Wms. Saund. 103 b, it is said—"It has been established by modern authorities, that the acceptance of a negotiable note or bill 'for and on account' of a debt, must be taken *prima facie* to be in satisfaction of that debt, until it appears that the note or bill remains unpaid in the possession of the creditor, *496] without any laches by him: *Kearslake v. Morgan*; *Burden v. Halton*, 4 Bing. 454, 1 M. & P. 223; *Kendrick v. Lomax*, 2 C. & J. 405; *Mercer v. Cheese*, 4 M. & G. 804, 5 Scott, N. R. 664. It is usually said that the taking of the note or bill *suspends* the creditor's remedy for the time it has to run; for, that it amounts to an agreement by him not to sue for that time, in consideration of the debtor's giving the note or bill: see *Simon v. Lloyd*, 2 C. M. & R. 187, 189, 3 Dowl. P. C. 818. It may be observed, however, that, where the obligee of a bond even expressly covenants not to sue for a certain time, this cannot be pleaded in bar of an action on the bond, but is a covenant only, for a breach of which the obligor may bring his action: *Ayloff v. Scrimshire*, Carth. 68, 1 Show. 46, Comb. 123, 2 Salk. 578. And the reason seems to be, that, if such covenant were allowed to operate in suspension of the action, the right of action would be altogether lost; inasmuch as it is a rule, that, where a personal action is once suspended by the voluntary act of the party, it is for ever gone, and discharged: *Fryer v. Gildridge*, Hobart, 10; *Corcheater v. Webb*, Cro. Car. 372; *Wankford v. Wankford*, 1 Salk. 302, 303, *per* POWELL, J. In truth, then, this abeyance of the creditor's right to sue seems an anomaly which the law has admitted, as part of the law-merchant, in respect of mercantile securities: *Owen v. Griffiths*, Exch. T. T. 1844. The difficulty of reconciling the doctrine with any principle, is increased by the courts' having declined to apply it to the case of a debt due for rent,—*Davis v. Gyde*, 2 Ad. & E. 623, 4 N. & M. 462,—or on a specialty: *Worthington v. Wigley*, 3 N. C. 454, 3 Scott, 558."(a) [V. WILLIAMS, J. Is not the plea an answer, as setting up a new agreement, as in *Good v. Cheeseman*, 2 B. & Ad. 328? That gets over *the difficulty as to accord and satisfaction.] It is submitted that the plea may be upheld in that view also. [V. WILLIAMS, J. Can there, in strictness, be a reservation of liberty to plead a thing in bar, which is not a release? In *Dean v. Newhall*, 8 T. R. 168, it was held, that, if the obligee of a bond covenant not to sue one of two joint and several obligors, and, if he do, that the deed of covenant may be pleaded in bar, he may still sue the other obligor. MAULE, J. Here, the proviso, that, in the event of molestation, the covenant may be pleaded in bar, seems designed merely to expound the former part,—showing that it was intended in the sense in which it would furnish a bar.]

(a) And see *Price v. Edmunds*, 10 B. & C. 578, as explained in 5 Mann. & Ryl. 287, 4 M. & G. 476 (a), 623 (b).

Willes, in reply. *Good v. Cheeseman* is altogether inapplicable to the view presented on the other side: this is not the simple case of a composition-deed. The passages cited from Rolle's Abridgment, as explained by a reference to the Year Books,^(a) show that the deed there supposed, operated as an immediate release. Here, however, the plain and obvious intention of the parties, was, merely to suspend the remedy.

WILDE, C. J. This question arises upon a plea which sets forth an agreement under seal between the defendant of the first part, three individuals named, as trustees, of the second part, and the plaintiff and certain other persons, creditors of the defendant, of the third part: and the plea, which is pleaded either as a bar to the action generally, or, in bar of the further maintenance of the action, states that the defendant had carried on the business of a silk-mercator; that the several debts due to the parties of the second and third parts, which were set opposite to their respective names, had accrued; *that the defendant was unable immediately to satisfy those debts; that, for the purpose of realizing his effects, it had been deemed advantageous to all the parties interested, that the defendant should, for five years, be permitted to carry on the business, under the inspection of the trustees; and that it was agreed that the business should be so carried on for the said term of five years. The plea then goes on to state, that, in pursuance of the agreement, the several persons parties thereto of the second and third parts, by that indenture gave and granted unto the defendant until the 17th of May, 1848 (the indenture bearing date the 17th of May, 1843), full and free license and authority to pass and repass, &c.; and that it was further provided, that, if any of the said persons parties thereto of the second and third parts, should, at any time thereafter during the continuance of the license thereby granted, *molest or interfere with the defendant, contrary to the true intent and meaning of the said indenture*, the defendant should be released, exonerated, acquitted, and for ever discharged of and from all debts and demands whatsoever which were then due unto, or then could be made by, the creditor or creditors respectively by whom the said letter of license thereinbefore contained, should in any such respect be contravened, and of and from all manner of actions, suits, &c., by reason, on account, or in consequence of the same debts or demands respectively, *and that the said indenture should or might be pleaded in bar to such respective debts or demands accordingly*. The molestation or interference here mentioned must be intended to mean such sort of molestation and interference as the parties lawfully might resort to, having relation to their situation as creditors and debtor. The question is, whether or not effect may be given to this agreement of the parties. Now, the first part of the deed operates as a letter of license, with a covenant on *the part of the creditors not to sue within a limited time. This, it is contended, on the part of the plaintiff, cannot

(a) Vide *suprà*, 494 (a).

be pleaded in bar : but it is said, upon the supposed authority of *Ford v. Beech*, that the only remedy of the covenantee is, by a cross action for damages. Nothing, however, fell from the court in *Ford v. Beech*, to countenance that supposition. Why is it that a covenant not to sue for a limited time cannot be pleaded in bar ? By reason of the rule that the right to a personal action once vested, and suspended, by the voluntary act of the party, for however short a time, is precluded and gone for ever. It could only be pleaded in bar ; for, that is its legal operation. To have allowed the agreement in *Ford v. Beech* to be pleaded in bar as a release, would have been obviously contrary to the intention of the parties : and no injustice followed from holding that the defendant's remedy for a breach was to be found in a cross action. But, how does that apply where we have to deal with express and unequivocal words, and in a case where there are circumstances to warrant our concluding that the parties intended to give a totally different effect to the contract from what is before stated ? Here, we have to deal with a contract entered into in express terms between a debtor and a body of twenty or thirty creditors, each of whom, for the benefit of the general concern, agrees that the debtor shall for a given period continue to carry on the business without molestation, and that, if that contract should be contravened by any creditor molesting or interfering with the debtor, such molestation or interference should operate an extinguishment of the debt, and that the indenture might be pleaded in bar to such debt. How would it be possible to secure the object the parties had in view, if effect could not be given to the agreement in the terms in which they have framed it ? The intention is beyond doubt. A covenant not *to sue for *500] a given time enures as a release, not by the mere agreement of the parties, but by operation of law.

Then it is said that that which has occurred here, is not a molestation within the meaning of the deed. Looking at all the circumstances, it is impossible to doubt that suing the debtor was the very species of molestation which the parties sought to guard against, and no other. They clearly could not have had anything else in their contemplation. When, therefore, this action,—which in the ordinary course would go on to judgment and execution,—was brought, the defendant had a right to assume that it was brought for the purpose of molesting or interfering with him, and so preventing him from carrying into effect the contract he had entered into. In the absence, therefore, of anything to control it, it seems to me that the parties contemplated a molestation by suing out a writ.

The cases referred to in Rolle's Abridgment, appear to me to afford distinct authority on the present occasion. We are to consider what is the effect of this deed, taking the whole of it together. On the part of the defendant, it is contended that the deed, taken altogether, operates as a release ; and accordingly he pleads it in bar. The plaintiff's counsel, on the other hand, argues with much ingenuity, that, if we hold it to be

a release, we must hold it to be a release from the moment of its execution ; and that is manifestly contrary to the intention of the parties. To extinguish the debt, would manifestly be to defeat the whole intention of the deed. But, upon what assumption is that ground taken ? Upon the assumption that every release, to have any operation at all, must operate from the moment at which it is given. I must confess I do not assent to that proposition. I do not see why parties may not agree that a certain instrument shall operate as a release, from the happening of such an event. The *passage in Co. Litt. referred to by my brother MAULE,^(a) [*501 seems to show that they may. There is, then, a clear and manifest intent, to be collected from the deed, that it shall operate as a release, from the happening of the event which the parties contemplated, viz. the molestation which has happened. It is no reason why effect should not be given to the clear intention of the parties, that, in so doing, we necessarily carry its operation somewhat beyond what was contemplated.

For these reasons, I am of opinion that the defendant is entitled to our judgment.

MAULE, J., concurred.

V. WILLIAMS, J. I am of the same opinion. The bringing an action is a molestation, and a breach of the covenant, and is properly pleaded as such. I further think that there is no objection to parties contracting by deed; that, if a given event shall happen, the deed shall operate as a defeasance of a debt. The passages in Rolle's Abridgment, and the case of *Ayliffe v. Scrimshire*, as reported by Carthew, seem to me to be good law, as far as is necessary to sustain this plea.

TALFOURD, J., concurred.

Judgment for the defendant.

(a) With which agrees the judgment of FENBY, C. J., in T. 21 H. 7, fo. 24.

*In the Matter of the Arbitration between JAMES STROUD
and THE EAST AND WEST INDIA DOCKS AND [*502
BIRMINGHAM JUNCTION RAILWAY COMPANY. Nov. 18.

A. agreed to let, and B. agreed to hire, a piece of land containing about 15 acres, at an annual surface-rent,—B. to use the land for the purpose of making bricks, and to pay to A., his executors, &c., 3s. per 1000 on the quantity made, the quantity made to be not less than 4,000,000 annually; the ground not to be excavated beyond the depth of eight feet, without the special permission of A. in writing.

A portion of the land being required by a railway company, B.'s claim for compensation in respect of his estate and interest in the land so required, and for deterioration to the residue, was referred to arbitration, under the provisions of the land-clauses-consolidation act, 1845,—8 & 9 Vict. c. 18. The umpire, by his award, found that the interest of B. under the above agreement was that of merely a *tenant from year to year*; and he assessed the compensation upon that basis:—

Held, that the construction put by the umpire upon the agreement was correct; and that evi-

dence tending to show that by the custom of the brick-making trade, brick land is never hired from year to year, was properly rejected. *Quare*, as to the power of the court to interfere, even if the decision of the umpire had been wrong.

THE following submission to arbitration was entered into between The East and West India Docks and Birmingham Junction Railway Company and one James Stroud, on the 10th of January, 1849:—

“Whereas The East and West India Docks and Birmingham Junction Railway Company, established and incorporated by the East and West India Docks and Birmingham Junction Railway act, 1846, have given to James Stroud, of Islington, in the county of Middlesex, brick-maker, a notice in writing, under the hand of Harry Chubb, their secretary, bearing date the 29th of May, 1848, setting forth that they required, under the powers, and for the purposes, of their act, to purchase a piece or parcel of land in which the said James Stroud was, or claimed to be, interested, and on which he had for some time past carried on the trade of a brick-maker, situate in the parish of St. Mary, *503] Islington, in the county of Middlesex, being part of the hereditaments numbered 19, on the deposited plan of the said railway, in such parish, and which said land and hereditaments were more particularly specified in the said notice, and delineated on the plan attached thereto; and the said company thereby demanded from the said James Stroud the particulars of his estate and interest in the said land and hereditaments so required to be purchased, and of the claims made by him in respect thereof: And whereas the said James Stroud is, or claims to be, interested in the same lands and hereditaments (with others), for brick-making purposes, for a term of years from the 10th of April, 1844, but he has not given to the said company any statement of the amount of compensation claimed by him in respect of such his estate and interest in the said land and hereditaments, which he is entitled to assign or convey to the said company under the powers of the lands-clauses-consolidation act, 1845 (8 & 9 Vict. c. 18), nor of the deterioration in value of the residue of the same hereditaments which are not required by the said company, or of the loss in trade to be sustained by him by reason of such land and hereditaments being taken by the said company: And whereas the said James Stroud hath, in pursuance of the power for that purpose given him by the lands-clauses-consolidation act, 1845, incorporated with and forming part of the said first-mentioned act, elected to have the value of his estate and interest of and in the said land and hereditaments, and the amount of compensation for damage by severance thereof, and for the loss (if any) in his trade as a brick-maker, occasioned by the said land and hereditaments being so required and taken as aforesaid, *504] and by the making of the said railway referred to arbitration *under the provisions of the said lands-clauses-consolidation act: And whereas a map or plan showing the land to be sold by the said James Stroud to the said company is hereunto annexed, and in such

map or plan the same land is coloured red, and the quantity required is figured thereon as 4 a. 3 r. 13 p.: Now, therefore, in pursuance of the provisions of the said lands-clauses-consolidation act, 1845, the said company do, by this writing, under the hand of Harry Chubb, their secretary, appoint Francis Fuller, of, &c., surveyor, to be the arbitrator on their behalf in the said matter, and the said James Stroud doth, by this writing, under his hand, appoint Charles Lee, of, &c., surveyor, to be the arbitrator on behalf of him the said James Stroud in the said matter; and the said arbitrators, or the umpire to be appointed by them, or under the said lands-clauses-consolidation act, 1845, are to ascertain and award the amount of compensation to be made and paid by the said company to the said James Stroud, or to be paid into the Court of Chancery, as the case may require, for and in respect of the injury and damage (if any) to be sustained by him by the interference with his said business of a brick-maker, and by the depriving him of a portion of his brick-earth, and for and in respect of the estate and interest so claimed by the said James Stroud, or which, under the provisions of the said acts, or either of them, he may be enabled to sell, assign, and convey, of and in the part of the said piece or parcel of land and hereditaments numbered 19, on the said plan annexed to the said notice, and therein coloured red, containing 4 a. 3 r. 13 p., and for all damage, by severance (if any) or otherwise, consequent upon such compulsory sale or purchase, or upon the making of the said intended railway, as directed by the provisions of the said lands-clauses-consolidation act, 1845, relating to arbitrations and awards, in cases of disputed *compensation,—which provisions (inclusive of those relating to the costs of and incident to [*505 the arbitration hereby agreed upon) are to extend to these presents, and be applicable thereto in all respects and to all intents and purposes as if the same had been herein repeated: and it is hereby mutually agreed by and between the parties hereto, that all expenses incidental to or arising out of this agreement, and of the reference hereby made, shall be borne and paid by the said company; the amount thereof to be settled, in case of difference, by the said arbitrators, or their umpire. Dated, &c."

The arbitrators, before proceeding with the reference, appointed one John George Hammack to be umpire.

It appeared that the land in question was held by James Stroud under the following agreement:—

"Memorandum of agreement between Robert Fellowes, of, &c., clerk, doctor of laws, of the one part, and James Stroud, of, &c., of the other part: The said Robert Fellowes agrees to let, and the said James Stroud agrees to hire, all that piece or parcel of land called Virginia Field, in the parish of Islington, containing fifteen acres, more or less, late in the occupation of Thomas Souter, and now of Samuel Bennett, with the cottage and garden at the south-eastern extremity of the same, paying for the land an annual surface-rent of 5*l.* an acre, and 10*l.* a year for the

cottage and garden belonging to the same. The said James Stroud is to use the land for the purpose of making bricks, and to pay to the said Robert Fellowes, his executors, administrators, or assigns, 3s. per thousand on the quantity of bricks so made, and that quantity to be certified by the Excise payments for the same: but the said James Stroud agrees to make at least 4,000,000 of bricks annually, or pay a rent equal thereto. The payment of the said brick-rent shall be made annually, at

*506] Christmas; *and the reserved, or surface-rent of 5l. an acre, shall be paid half-yearly, at Christmas and Midsummer. The aforesaid James Stroud, his executors, administrators, or assigns, shall preserve all hedges, fences, walls, water-courses, drains, and gates belonging to the within-mentioned land, in good order and repair. And it is hereby further agreed, that all gravel, chalk, sand, or other materials, found in working the brick-earth, shall be the sole property of the said Robert Fellowes, his executors or assigns; but the said James Stroud shall be allowed to take therefrom, and without paying for the same, whatever chalk, gravel, or sand, he may require in the manufacturing of the bricks upon the premises. The said James Stroud, for himself, his executors, administrators, and assigns, undertakes to preserve the top soil, and to level the ground as the brick-earth is progressively cleared. The said James Stroud agrees not to excavate the ground beyond the depth of eight feet, without the special permission in writing of the said Robert Fellowes, his executors, administrators, or assigns. It is further agreed that the said James Stroud, his executors, administrators, or assigns, shall pay all rates, taxes, and outgoings whatsoever which are or shall in any way or form be chargeable upon the land herein agreed to be demised. In witness, &c."

A claim was made, on behalf of Stroud, before the umpire, of 3838l. 2s., as and for a compensation to be made and paid by the company to him, "for and in respect of the injury and damage to be sustained by him by the interference in his business of a brick-maker, and by depriving him of a portion of his brick-earth, and for and in respect of the estate and interest to which he claimed to be entitled under or by virtue of the agreement of the 10th of April, 1844." And in support of his claim he proposed to call witnesses before the umpire, to prove that it *507] was contrary to the custom of *the trade of brick-making, that land should be hired under a yearly tenancy. But the umpire refused to receive evidence of that character.

The umpire, on the 19th of April last, made his award, as follows:—

"To all to whom these presents shall come, &c.: Whereas, by a certain agreement or instrument in writing, bearing date, &c. (reciting the submission): And whereas the said F. Fuller and C. Lee, the arbitrators so appointed as aforesaid, did, on the 20th of January, 1849, in pursuance of the power for that purpose given them by the lands-clauses-consolidation act, 1845, before entering upon the matters so referred to them as

aforesaid (and having previously made and subscribed the declaration by the same act required in that behalf), by writing under their hands, appoint me, the said J. G. Hammack, to be the umpire to decide between them on the matters so referred to them as aforesaid: And whereas the said arbitrators did afterwards enter upon the matters so referred to them as aforesaid; but they the said arbitrators failed to make any award upon the said matters within twenty-one days after the day on which they were so appointed as aforesaid; and the time for their making their said award not having been extended; Now know ye that I, the said J. G. Hammack, so appointed umpire as aforesaid, having taken upon me the burthen of the umpirage, and having, before entering upon the consideration of the matters so referred to me as aforesaid, duly made and subscribed the declaration required in that behalf by the lands-clauses-consolidation act, 1845, *and having been requested by both the said parties* to the said reference to state on the face of this my umpirage, the nature and extent of the term and interest which I find and adjudge the said James Stroud to have had in the before-mentioned land and hereditaments, and in respect of which he so claims *to be entitled to compensation as aforesaid, and having deliberately and at large [*508 heard, examined, and considered the several allegations, witnesses, and evidences of both the said parties concerning the said premises, do thereupon make this my umpirage and final determination in writing between the said parties of and concerning the premises, in manner and form following, that is to say,—I do find, adjudge, and determine that the said land was and is part and parcel of a certain field called Virginia Field, in the parish, &c., and that the said James Stroud was entitled to, and held and occupied, the said land and hereditaments under and by virtue of a certain instrument in writing, bearing date the 10th of April, 1844, and made and entered into by and between him the said James Stroud and one Robert Fellowes, and which said instrument was and is in the words and figures following, that is to say, &c. (setting out the agreement): And I do further find, adjudge, and determine, that the term and interest which the said James Stroud had in the said land and hereditaments, was that of a *tenant from year to year*, and that he was entitled to compensation from the said company, in respect thereof, as tenant from year to year only: And I do further find, award, adjudge, and determine that the compensation to which the said James Stroud is entitled, and which is to be made and paid by the said company to the said James Stroud, or to be paid into the Court of Chancery, as the case may require, for and in respect of the injury and damage which he the said James Stroud will sustain by the interference with his said business of a brick-maker, and by the depriving him of a portion of his brick-earth, and for and in respect of the estate and interest so claimed by the said James Stroud, and which, under the provisions of the said acts, he is enabled to sell, assign, and convey, of and in the said part of the said piece or parcel of

*509] *land and hereditaments numbered 19 on the said plan annexed to the said notice, and therein coloured red, containing 4 a. 3 r. 13 p., and for all damage, by severance or otherwise, consequent upon such compulsory sale or purchase, or upon the making of the said intended railway, amounts to the sum of 150*l.*: And, lastly, I do find, award, and determine, that the costs of and incident to the said arbitration amount to the sum of 148*l.* In witness, &c."

Byles, Serjt., in Trinity term last, obtained a rule to show cause why the award should not be set aside, on the grounds, that the umpire had assessed the compensation due to Stroud upon a wrong principle; that the memorandum of the 10th of April, 1844, set forth in the award, created a greater interest, legal or *equitable*, than a mere tenancy from year to year; that Stroud was entitled to a larger sum than the umpire had awarded to him; that the umpire had not given compensation for the full loss sustained by Stroud; and that the umpire refused to receive evidence that a mere tenancy from year to year was contrary to the custom of the brick-trade in taking land for brick-making purposes. He submitted that the agreement of the 10th of April, 1844, operated in law as a lease for so long a period as should be necessary to enable Stroud to excavate the brick-earth to the depth of eight feet, or, at all events, gave him an *equitable* interest in the land: and he referred to Co. Litt. 42 a, Ross's case, F. Moore, 556, Sir W. Cordell's case,^(a) Doe d. Player v. Nicholls, 1 B. & C. 336, 2 D. & R. 480, Doe d. White v. Simpson, 5 East, 162, and the 8 & 9 Vict. c. 18, s. 6, and ss. 25 to 37.

*510] **Malins* and *J. Brown*, on a former day in this term, showed cause. The decision of the umpire upon the question of value, is by the statute (8 & 9 Vict. c. 18, s. 27) declared to be final: the matter, therefore, is not open to the consideration of the court. [MAULE, J. Does it appear on the face of the award that the value was assessed upon an erroneous principle?] The principle of assessment does appear: the award shows that the amount of compensation was assessed upon the footing of the interest created by the agreement of the 10th of April, 1844, being that of a tenancy from year to year only. The party has selected his own tribunal, and from its decision there is no appeal. This is no hardship on the land-owner; for, though the company cannot enforce an arbitration, the land-owner has power to compel them to go to arbitration, or he may appeal to a jury. [MAULE, J. Do you insist that the award is conclusive, although it is shown upon the face of it that the arbitrator has adopted a wrong principle?] Yes. [V. WILLIAMS, J. Suppose the award recites that the claimant has an estate in fee, and then goes on to find that the value of a life-estate is so much, and the arbitrator directs that sum to be paid,—would such an award be conclusive?] In that case, perhaps it might be said that the arbitrator

(a) Cited in 8 Co. Rep. 96, and (per nom. Cordal's case) Cro. Eliz. 316.

was dealing with a matter which was not within the submission. [TALFOURD, J. If, instead of an arbitration, this had been an assessment before a sheriff's jury, under the subsequent clauses of the act (§§ 38 to 50), and the sheriff had misdirected the jury that the interest of the claimant was that of a tenant from year to year, when in truth he was entitled to the fee,—would the court interfere in that case?] That involves a totally different inquiry: there is no provision making the finding of a jury conclusive. [WILDE, C. J. Parties *refer matters in difference, by agreement; and a statute (8 & 9 W. 3, c. 11) authorizes the agreement to be made a rule of court. [*511 Under the lands-clauses-consolidation act, a similar tribunal is created; and s. 36 empowers either party to make the submission a rule of court. What is the object of that provision, if not to give the court some control in the matter?] The statute gives the court power to regulate the conduct of arbitrators to be appointed under it, as in other cases. But this is an attempt to induce the court to control the arbitrator's discretion; whereas, the act says that this decision shall be final. [V. WILLIAMS, J. Does that provision of the act amount to anything more than the ordinary clause in every agreement of reference, that the determination of the arbitrator shall be final? MAULE, J. Has the umpire here assessed the value of the thing he was called upon to assess?] The nature of the interest, as well as the value, was referred. [MAULE, J. You say, that, notwithstanding the umpire has manifestly made a mistake in ascertaining the nature of the interest, the court has no control over the award?] The award is final and conclusive. [Warren referred to *Jones v. Corry*, 5 N. C. 187, 7 Scott, 106, where an arbitrator, with a view of enabling one of the parties litigant, to make an application to the court, after the publication of his award, stated matters which showed that he had put a mistaken construction on the rule of reference, and had misdecided accordingly,—the court received affidavits of these facts, and set aside the award, notwithstanding there was no objection on the face of it. WILDE, C. J. referred to *Home v. Earl Camden*, 2 H. Blac. 533.] In *Wright and The Cromford Canal Company*, 1 Q. B. 98, 4 P. & D. 730, on a submission to arbitration, *not giving power to raise questions of law for the opinion of the court, the arbitrators awarded 82*l.* as compensation for damages; and, in a subsequent part of their award, they stated, "for the purpose of raising the question for the determination of the court, in case it should be pleased to entertain the same," that they awarded the 82*l.* on a certain principle, which they explained; but, if the court should think that the damage ought to be estimated on another principle, which they likewise stated, then they awarded a compensation of 102*l.*: and it was held, that the award was sufficiently final; for, that, as the sum of 82*l.* was positively awarded, the hypothetical adjudication which followed might be rejected as surplusage. So, in *Barton v. Ranson*, 3 M. & W. 322, a cause and all matters in

difference having been referred to arbitration, the arbitrator set out all the facts upon the face of his award, and then awarded that the plaintiff had no cause of action against the defendant; and stated that he determined the action in favour of the defendant: he then, after awarding by whom the costs of the reference should be paid, concluded as follows:—"But, if the court shall be of opinion, upon the facts hereinbefore stated, that the plaintiff is entitled to recover in the action, then I determine the action in favour of the plaintiff, and order and award that the defendant pay damages to the plaintiff to the amount of one shilling, and also pay to the plaintiff the costs of the reference:" and it was held,^(a) that, the arbitrator having come to a positive finding, and expressly declared his own opinion, the award was sufficiently final, and the latter clause might be rejected. This is, in effect, an attempt to review the arbitrator's decision upon a matter of fact; which cannot be done: *Barrett v. Wilson*, 1 C. M. & R. 586, 5 Tyrwh. 218, 3 Dowl. P. C. 220.

*513] PARKE, B., in that case says: "The parties have agreed to be bound by the arbitrator's opinion of the facts, not by ours. The court have a control over juries as to matter of fact, which they exercise where the conclusion is manifestly wrong. They have no such control over an arbitrator as to matter of fact. Whether I should have come to the same conclusion as the arbitrator has done, is a different question; but, the parties being bound to abide by his decision of the facts, we cannot interfere, if there were any evidence to support his conclusion." In *Phillips v. Evans*, 12 M. & W. 309, S. C., per nom. *Phillips v. Edwards*, 1 D. & L. 463,—which overrules *Jones v. Corry*,—the Court of Exchequer refused to set aside an award, although it was sworn that the arbitrator had admitted that he had made a mistake in figures. [WILDE, C. J. This court, in *Hall and Hinds, in re*, 2 M. & G. 847, 3 Scott, N. R. 250, took rather a different view of a similar question. There, certain disputes and differences between A. and B. were referred to the arbitrament of three merchants: before the arbitrators, A. admitted that a sum of 143*l.* 15*s.* 11*d.* was due from him to B., but the latter claimed a larger sum; and the arbitrators found that in reality a *further* sum of 75*l.* 4*s.* 11*d.* was due from A. to B.: instead, however, of *adding* these two sums together, and directing A. to pay the aggregate amount to B., the arbitrators by mistake *deducted* the latter sum from the former, and, by a further mistake, *directed that B. should pay the difference to A.* Upon an affidavit of the facts, by *two* of the arbitrators (the third declining to join in the affidavit), the court set aside the award,—on the ground that the arbitrators had failed to express in the award the intention of their own minds, and the mistake and act of carelessness being so gross as to amount, in the judicial sense of the term, to *misconduct* *on the part of the arbitrators.] That case is observed upon with *514] evident disapprobation in *Phillips v. Evans*. *Doe d. Oxenden v. Cropper*, 10 Ad. & E. 197, 2 P. & D. 490, is also directly at variance

(a) *Dissentiente* BOLLARD, B.

with *Jones v. Corry*. There, an ejectment brought for close A. and close B., was referred at nisi prius to an arbitrator, together with an action for a trespass upon close B., brought by the lessor of the plaintiff against the same defendant. In the action of trespass, there were special pleas justifying on the ground of title to close B. in the defendant. The arbitrator ordered a verdict on all the issues in the action of trespass for the defendant, except one issue on a plea of not guilty: but he ordered a general verdict for the plaintiff in the ejectment. By a paper which he delivered with the award, stating his reasons, it appeared that he considered that the lessor of the plaintiff had no title to close B.: and, notwithstanding this manifest repugnancy, it was held, that the *postea* in the ejectment could not be amended by confining it to close A., and that the lessor of the plaintiff was entitled to retain the general verdict. [TALFOURD, J. This question was very much discussed in a case in the Queen's Bench during the last term, when the court did interfere to set aside the award, on the ground of a mistake of the arbitrator.(a)]

* *Warren*, contra. The argument on the other side must go [*515]

(a) *Hutchinson v. Shepperson*, reported in the 13 Jurist, 1098, and 14 Law Times, 127. It was a motion to set aside an award, on the ground that the arbitrator had, by mistake, omitted to give the plaintiff credit for a sum to which the defendant had admitted him to be entitled. The affidavit upon which the rule was obtained, stated, that, at the commencement of the proceedings before the arbitrator, he was told by both parties that there was no dispute between them as to that particular sum, and that therefore he need not trouble himself about it. In making his award, however, the arbitrator omitted to give the plaintiff the benefit of that admission, and threw that sum altogether out of the calculation.

LORD DENMAN, in delivering the judgment of the court, after time for deliberation, said:—"This was a rule to set aside an award, on account of an error committed by the arbitrator. He omitted to give the plaintiff credit for a sum of money to which he seems to be distinctly admitted to be entitled. At the commencement of the proceedings, when the parties met, this acknowledgment was made, and the arbitrator was desired to take no trouble as to this sum, since the plaintiff's right to it was not disputed. The arbitrator rejected what was said, although that sum was said to be no matter in difference between them; and so has deprived the plaintiff of what is confessedly his due. The defendant has thought proper to take advantage of this error, and even to appear against the rule obtained. His learned counsel relied on some strong expressions used by Mr. Baron PARKER in *Phillips v. Evans*, 12 M. & W. 309, which seemed to indicate that no mistake of an arbitrator can ever be a sufficient ground for setting aside an award. We are fully satisfied of the propriety of observing the greatest caution with regard to this subject, to avoid inquiries which would unravel by-gone transactions, and keep alive a litigation which the parties have agreed to determine by reference; but we cannot think the rule applies to a case where arbitrators have exercised no judgment on the particular facts, but have forborne to do so in consequence of direct instructions from both parties to exclude it from their consideration. The rule, at most, is one for guiding our discretion, which cannot be so absolutely fettered and rendered powerless. We are aware, that, if awards are allowed to be questioned under any circumstances, it must be difficult to draw a line: but a line must be drawn somewhere; and this case appears to fall within it, wherever that line can be drawn. The court might have refused a rule to show cause, on account of the inexpediency of the practice, and the danger of altering accounts in matters referred; but, the rule having been once granted, upon affidavits clearly setting forth, and without contradiction, a case of great injustice, which the court has power to remedy, we think we ought not to sanction that injustice. We would further observe, with respect to the case of *Re Hall and Hinds*, 2 M. & G. 847, 3 Scott, N. R. 250, which is a clear precedent for such decision, this case is not overruled by the Court of Exchequer in *Phillips v. Evans*, 12 M. & W. 309, where the facts were withheld by the arbitrator, which were brought satisfactorily before the court here. The case of *Re Hall and Hinds* is expressly recognised in *Hagger v. Baker*, 14 M. & W. 9, 2 D. & L. 856, where the court refused to interfere; and we approve of the excellent observations there made by the lord chief baron."

*516] this length, that, in the case of a reference *under this statute, however obvious and however gross the miscarriage on the part of the arbitrators or umpire has been, the party aggrieved is absolutely without remedy, because the legislature has used words which are found in every agreement or order of reference. The only meaning of the word "final" in this act, and in every submission, is, that the arbitrator shall not decide conditionally. The object of every reference is, to stop litigation: that object is not attained, if the award is not final. The root of the umpire's authority is found in the 23d section of the land-clauses-consolidation act, which enacts, that, "if the compensation claimed or offered in any such case shall exceed 50L, and if the party claiming compensation desire to have the same settled by arbitration, and signify such desire by notice in writing to the promoters of the undertaking, before they have issued their warrant to the sheriff to summon a jury in respect of such lands, under the provisions hereinafter contained, stating in such notice the nature of the interest in respect of which such party claims compensation, and the amount of the compensation so claimed, the same shall be so settled accordingly." The 25th section enacts, that, "when any question of disputed compensation by this or the special act, or any act incorporated therewith, authorized or required to be settled by arbitration, shall have arisen, then, unless both parties shall concur in the appointment of a single arbitrator, each party, on the request of the other party, shall nominate and appoint an arbitrator, to whom such dispute shall be referred; and every appointment of an arbitrator shall be made, on the part of the promoters of the undertaking, under the hands of the said promoters, or any two of them, or of their secretary or clerk, and, on the part of any other party, under the hand of such party, or, if such party be a corporation aggregate, under the common seal of such *corporation; and such appointment shall be delivered to the arbi-
*517] trator, and shall be deemed a submission to arbitration on the part of the party by whom the same shall be made; and, after any such appointment shall have been made, neither party shall have power to revoke the same without the consent of the other, nor shall the death of either party operate as a revocation; and if, for the space of fourteen days after any such dispute shall have arisen, and after a request in writing, in which shall be stated the matter so required to be referred to arbitration, shall have been served by the one party on the other party, to appoint an arbitrator, such last-mentioned party fail to appoint such arbitrator, then, upon such failure, the party making the request, and having himself appointed an arbitrator, may appoint such arbitrator to act on behalf of both parties; and such arbitrator may proceed to hear and determine the matters which shall be in dispute; and, in such case, the award or determination of such single arbitrator shall be final." The 27th section enacts, that, "where more than one arbitrator shall have been appointed, such arbitrators shall, before they enter upon the matters referred to them,

nominate and appoint, by writing under their hands, an umpire to decide on any such matters on which they shall differ, or which shall be referred to him under the provisions of this or the special act; and, if such umpire shall die, or become incapable to act, they shall forthwith, after such death or incapacity, appoint another umpire in his place; and the decision of every such umpire on the matters so referred to him shall be final." The 36th section provides that "the submission to any such arbitration may be made a rule of any of the superior courts, on the application of either of the parties." Why is that, but to give the court jurisdiction over the arbitrators and over the subject-matter of the reference, as in cases of ordinary *submissions to arbitration? And the 37th section provides that "no award made with respect to any ques- [*518] tion referred to arbitration under the provisions of this or the special act, shall be set aside for irregularity, or error in matter of form." This latter provision would be idle, if the court had no jurisdiction at all. [MAULE, J. It is conceded that the court may interfere where the arbitrator has exceeded, or fallen short of, the authority conferred upon him.] The courts will always interfere where it is apparent on the face of the award, that the arbitrator has made a substantial mistake. This principle is distinctly recognised by this court in *Fuller v. Fenwick*, 3 Man. Gr. & S. 705, where many of the authorities are collected. *Jones v. Corry* is not, in terms, overruled by any case: and *Re Hall and Hinds* is expressly recognised in *Hagger v. Baker*, 14 M. & W. 9, 2 D. & L. 856. In *Broadhurst v. Darlington*, 2 Dowl. P. C. 38, where an action was brought by an attorney, on a bill not taxable, and a verdict was taken, subject to a reference as to the amount of the charges, and the arbitrator awarded a certain sum,—it was held that it was competent for the court to examine whether the arbitrator had adopted the right rule. And Lord LYNTHURST said: "If the arbitrator intended to adopt the proper rule, and has not done so, this is not his award." Here, the award assumes to have been made in conformity with the 6th section of the statute, which enacts, that, "subject to the provisions of this and the special act, it shall be lawful for the promoters of the undertaking to agree with the owners of any lands by the special act authorized to be taken, and which shall be required for the purposes of such act, and with all parties having any estate or interest in such lands, or by this or the special act enabled to sell and convey the same, for the *absolute purchase, [*519] thereof as they shall think proper, and of all estates and interests in such lands, of *what kind soever*." Under this act, the court has even a larger equitable jurisdiction than at common law. The point was expressly stated by the arbitrator, at the request of both parties, for the purpose of obtaining the opinion of the court.

WILDE, C. J. This point is one which is deserving of consideration.

Should it become necessary to decide it, we will take time to look into it. At present, we wish to hear the rest of the argument.

Malins and *J. Brown* resumed their argument. Upon the construction of the agreement of the 10th of April, 1844, the arbitrator clearly came to a correct conclusion. By the express words of the statute 8 & 9 Vict. c. 106, that agreement would create only a tenancy at will, which, by the subsequent payment of rent, would be turned into a tenancy from year to year. It will be necessary to consider, first, what is the *legal* operation of the instrument; secondly, what is its effect and operation *in equity*. In a court of law, it clearly operates only to create a tenancy from year to year: *Clayton v. Blakey*, 8 T. R. 3, as explained by Lord ELLENBOROUGH, in *Thunder d. Weaver v. Belcher*, 3 East, 451. Suppose this court to be sitting as a court of equity, and a bill filed for a specific performance,—what is the effect of the contract? It is a contract for the working out the brick-earth: and it will probably be said on the other side, that it is to enure until the brick-earth is exhausted. [MAULE, J. It is rather in the nature of a license to commit the *520] waste of digging the brick-earth.] *The intention of the parties must be gathered from the face of the instrument. No obligation is imposed on the tenant to make bricks. A court of equity will not enforce a specific performance of an agreement for a mere tenancy at will: *Browne v. Warren*, 14 Ves. 156. If the parties here had intended this to operate as a license to dig all the brick-earth, they might have said so. It is essential to the creation of a lease, that it should have a certain commencement and a certain ending. [WILDE, C. J., referred to *Doe d. Hanley v. Wood*, 2 B. & Ald. 724. There, the owner of the fee granted to A., his partners, fellow-adventurers, &c., free liberty to dig for tin, and all other metals, throughout certain lands described in the indenture, and to raise, make merchantable, and dispose of the same to their own use, and to make adits, &c., necessary for the exercise of that liberty, together with the use of all waters and watercourses, excepting to the grantor liberty for driving any new adit within the lands thereby granted, and to convey any watercourse over the premises granted; *habendum* for twenty-one years; covenant by the grantee to pay one-eighth share of all ore to the grantor, and all rates, taxes, &c., and to work effectually the mines during the term; and then, in failure of the performance of any of the covenants, a right of re-entry was reserved to the grantor: and it was held that this deed did not amount to a lease, but contained a mere license to dig and search for minerals, and that the grantee could not maintain an ejectment for mines lying within the limits of the set, but not connected with the workings of the grantee. [MAULE, J. In *Doe d. White v. Simpson*, 5 East, 162, a term determinable on payment of certain debts and annuities, was upheld. That was the case of a will: and, though *521] *the decision might be justified by the anxiety of the court to carry into effect the intention of the testator, and to provide for

the payment of debts, it has never been very much approved.] This matter was much discussed in *Haigh v. Jaggard*, 16 M. & W. 525.(a) There, a term of twelve years was created for the purpose of enabling the lessees to get the coal out of six acres of land,—with a proviso, that, if, at the end of the term, all the coal in the six acres should not have been got, the lessees were to be at liberty to get the remainder: and it was held to be a lease for twelve years only. In the argument in that case, *Doe d. Simpson v. White*, Co. Litt. 42 a, and the note 7 thereto, and *Rosse's case*, were cited on the part of the defendants. [WILDE, C. J. *Rosse's case* is observed upon in *Thompson v. Mackworth*, Sir O. Bridgman, 513, 514, and said by the court not to be law.] The Court of Exchequer declined to act upon it in *Haigh v. Jaggard*. [WILDE, C. J. There is no way of bringing about a determination of the term here: there is no provision for re-entry; and there could be no distress for the rent.] It lies on the other side to make out clearly, and without doubt or ambiguity, that it was the intention of the parties to create, by this agreement, an interest of a more extended nature than a tenancy from year to year. In *Bac. Abr. Leases* (L) 3, it is said: "As to the certainty of leases for years, as to their continuance, this ought to be ascertained, either by the express limitation of the parties at the time of the lease made, or by a reference to some collateral act which may, with equal certainty, measure the continuance thereof, otherwise they will be void.(b) If a woman be *enicient* with a son, and a lease *be made till such [*522 issue in *venter sa mere* shall come to full age, this is a lease only at will, and cannot be any lease for years; because it is uncertain when, or whether ever, the son will be born, and, consequently, the beginning, continuance, and ending of this lease is uncertain; and therefore it cannot be said any lease for years, since it is to begin presently as a lease: and yet nothing appears in the deed itself, nor is there such a reference to any collateral circumstance, as may then measure the continuance thereof."(c)

The umpire's rejection of evidence as to the supposed custom of the brick-making trade, upon the hiring of land, clearly is no ground for impeaching the award. An arbitrator's, or umpire's conclusion, is final. He is made the judge of the law, as well as of the facts: and from his decision there is no appeal: see the cases collected in *Watson on Awards*(d) and *Archbold's Practice*.(e) In *Perryman v. Steggall*, 9 Bingh. 679, 3 M. & Scott, 93, this court refused to set aside the award of a barrister, on a suggestion that he had admitted an incompetent witness. So, in *Ashton v. Poynter*, 3 Dowl. P. C. 201, 1 C. M. & R. 738, and *Huntig v. Ralling*, 8 Dowl. P. C. 879, it was held that parties referring a matter

(a) And see 17 Law Journ. N. S. Exch. 110, 18 Law Journ. N. S. Exch. 125, and 2 Coll. C. C. 231.

(b) Citing *Say v. Smith*, in C. B., Plowd. 271.

(c) *The Bishop of Bath's case*, 6 Co. Rep. 34 b.

(e) 10th edit. by Chitty, Vol. II. p. 1493, 9.

(d) Page 120, *et seq.*

to arbitration, are equally bound by the arbitrator's decision, whether he is a professional man or not. The same doctrine was still more recently laid down by this court in *Fuller v. Fenwick*, 8 Man. Gr. & S. 705. At all events, the evidence here offered was properly rejected. [WILDE, C. J. There is nothing in this objection. The question before the arbitrator was, not what was the custom of the brick-making *trade, but *523] what was the agreement into which these parties had entered ?]

Byles, Serjt., and *Warren*, in support of the rule. The plain intention of the parties to this agreement was, that Stroud should have an interest in the land,—either legal or equitable,—of sufficient duration to enable him to work out all the brick-earth to the depth of eight feet: and, although the court will not take judicial notice of the custom of the particular trade, yet, in construing an instrument of this sort, they are bound to look at all the surrounding circumstances from which they may be aided in ascertaining the real intention of the contracting parties. This principle was recently acted upon by the Court of Queen's Bench in two cases of *The Queen v. Westbrook* and *The Queen v. Everist*, 10 Q. B. 178, where a question arose as to the proper mode of rating the occupiers of brick-fields to the relief of the poor: and where Lord DENMAN, in delivering the judgment of the court, says: "The material facts found in both cases are nearly the same. In both it is stated that much expense, and the introduction of foreign matters, are necessary, in order to make the occupation productive and profitable; and the result is liable to much risk: it is understood, therefore,—if not made legally certain,—that the tenancy shall be of some years' duration, and the rent is in part only fixed, in part made to depend, in the nature of a royalty, on the number of bricks made; the material, the brick-earth, is not in its nature renewable, and in both cases will be consumed, according to reasonable calculation, within no great number of years." The instrument in question is, in truth, a license (coupled with an interest, and therefore irrevocable) to enable Stroud to retain *possession of the land for so *524] long a period as may be necessary to get out the brick-earth to the stipulated depth. The distinction between executory and executed trusts is accurately pointed out by Lord Chancellor TALBOT, in the case of *Lord Glenorchy v. Bosville*, Cas. temp. Talbot, 3, 19, where his lordship says: "I repeat it, I think in cases of trusts executed, or immediate devises, the construction of the courts of law and equity ought to be the same; for, there the testator does not suppose any other conveyance will be made: but, in executory trusts, he leaves somewhat to be done; the trusts to be executed in a more careful and more accurate manner." In *Doe d. Warner v. Browne*, 8 East, 165, by a memorandum of agreement made between A. and B., the former, in consideration of 40*l.*, agreed to let, and the latter agreed to take, a messuage, &c., at 40*l.* *per annum* clear rent, to be paid quarterly, &c.: and it was further agreed that A. should not raise the rent, *nor turn out B. so long as the rent was duly paid*

quarterly, and he did not expose to sale or sell any article that might be injurious to A. in his business. The Court of Queen's Bench held this memorandum to create a tenancy from year to year only. The defendant then filed a bill for a specific performance, (a) a demurrer to which was overruled, the Lord Chancellor (Lord ELDON) observing,—“Without laying stress upon the title, ‘Memorandum of an agreement,’ an expression to which some, perhaps not much, consideration is due, it proceeds to state, that ‘W. Warner, in consideration of 40*l.*, doth agree to let, and J. Browne doth agree to take, &c.’ That phrase will not exclude the idea of an actual demise in some cases: but, if the whole imports rather an intention to do a future act, than a thing that is done, those words may be construed *as not amounting to actually letting and taking. If the opinion [*525 of the Court of King's Bench was, that the subsequent words meant, that the tenant was to have the option of remaining for life, and the former words may mean either actually letting and taking, or a contract for actually letting and taking, it is fair to consider it as an agreement, rather than an actual lease; as the latter construction would defeat the intention of the parties, which, upon the former construction, may be carried into effect by a future instrument.” And afterwards, on continuing the injunction, his lordship said (14 Ves. 409, 413): “I admit that the court must find, in the paper before it, sufficient evidence of the term and interest intended to be granted: but, even if the bill should be dismissed upon that ground, relief of a more limited kind must be given upon another ground, with reference to the terms in which the agreement is conceived. According to the old doctrine, an agreement to let was not understood to make a lease. Afterwards, the courts held, that, if a person said he agreed to let, it was the same as doing the thing: but it was never denied, that, if the terms of that instrument indicate that he was looking forward to something executory, before the contract would be complete, that would not be held a lease.” The words “herein agreed to be demised,” in the last clause of this agreement, would be senseless, if only a tenancy from year to year were contemplated. [MAULE, J. Those words mean no more than “the land hereinbefore spoken of.” What is there here which shows that something future was contemplated?] The tenant was to be at liberty to exhaust the whole of the brick-earth. [MAULE, J. If he could do it within the term.] The absence of a proviso for re-entry, shows that a more formal instrument was intended to be drawn up between *the parties. [WILDE, C. J. Or that a [*526 tenancy from year to year only was meant to be created. Which is the more probable?] That this is something more than a mere license, is clear from the judgment of VAUGHAN, C. J., in *Thomas v. Sorrell*, where his lordship says (Vaughan, 351): “A dispensation or license properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful which without it, had been unlawful.

(a) *Browne v. Warner*, 14 Ves. 156.

As, a license to go beyond the seas, to hunt in a man's park, to come into his house, are only actions which, without license, had been unlawful. But a license to hunt in a man's park, and carry away the deer killed to his own use,—to cut down a tree in a man's ground, and to carry it away the next day after to his own use,—are licenses as to the acts of hunting and cutting down the tree, but, as to the carrying away of the deer killed, and tree cut down, they are grants. So, to license a man to eat my meat, or to fire the wood in my chimney to warm him by, as to the actions of *eating*, firing my wood, and warming him, they are licenses; but it is consequent necessarily to those actions, that my property may be destroyed in the meat eaten, and in the wood burnt. So as in some cases, by consequent, and not directly and as its effect, a dispensation or license may destroy and alter property." It is no objection to this instrument, that it mentions no specific term for which a lease is to be granted: *id certum est, quod certum reddi potest*: and it may be shown, by calculation, that the brick-earth demised, would, at the rate mentioned in the agreement, viz. 4,000,000 annually, be exhausted in fifteen years. Every stipulation in the agreement points irresistibly to the conclusion that the tenant's occupation of the land was intended to be co-extensive with its capacity *for yielding materials for his trade. The maxim "*verba chartarum fortius accipiuntur contra proferentem*," applies especially to contracts between landlord and tenant. In Broom's Maxims, 2d edit. 456, it is said: "It is a general rule, that the words in a deed are to be construed most strongly *contra proferentem*,—regard being had, however, to the apparent intention of the parties, as collected from the whole context of the instrument;(a) for, as observed by Mr. Justice Blackstone, the principle of self-preservation will make men sufficiently careful not to prejudice their own interest by the too extensive meaning of their words; and hereby all manner of deceit in any grant is avoided; for men would always affect ambiguous and intricate expressions, provided they were afterwards at liberty to put their own construction upon them.(b) Moreover, the adoption of this rule puts an end to many questions and doubts which would otherwise arise as to the meaning and intention of the parties, which, in the absence of it, might be differently construed by different judges; and it tends to quiet possession, by taking acts and conveyances executed beneficially for the grantees and possessors."(c) So strictly is this principle adhered to, that, if a lease be granted "for seven, fourteen, or twenty-one years," the lessee alone has the option of determining it at the end of the first seven or fourteen years: *Dann v. Spurrier*, 8 B. & P. 899, 442;(d) *Doe d. Webb v. Dixon*, 9 East, 15. Lord ELDON, in the

(a) Per Lord KENYON, *Barrett v. Duke of Bedford*, 8 T. R. 605; per Lord ELDON, *Browning v. Wright*, 2 B. & P. 23; per BAYLEY, J., 15 East, 546; per PARK, J., 1 B. & B. 335; *Miller v. Mainwaring*, Cro. Car. 400; 3 Ves. jun. 48; Co. Litt. 183 a; *Noy's Maxims*, 9th edit. p. 48.

(b) 2 Bla. Comm. 380. See *Saunderson v. Piper*, 5 N. C. 425, 7 Scott, 408; *Reynolds v. Barford*, 8 Scott, N. R. 238, 239.

(c) Bac. Max. r. 3, which treats of the general rule.

(d) And see 7 Ves. 231.

latter *case, says: "All doubts which might at one time have existed on the subject, are concluded by the decision in the Common Pleas,^(a) which was made upon full consideration of the case in this court^(b) and the antecedent authorities, and which proceeded upon the application to leases, of the general principle, that, where the words of a grant are doubtful, they are to be construed in favour of the grantee: and that was certified to the lord chancellor, who must be taken to have been satisfied with the decision." It is rather insinuated than asserted, that the cases of *Doe d. White v. Simpson* and *Doe d. Player v. Nicholls* are disapproved of by conveyancers. But the latter case is cited and acted upon in *Doe d. Davies v. Davies*, 1 Q. B. 480, 1 Gale & D. 33, where Lord DENMAN says: "HOLROYD, J., said rightly (in *Doe d. Player v. Nicholls*), that, where there are no words in the will which give the trustees any estate beyond the time during which the trust is to be performed, there the case falls within the general rule, that a trust estate is not to continue beyond the period required by the purposes of the trust. And that must mean a restricted period, and not any length of time during which it may be said that the trusts are in a course of performance. In *Doe d. Shelley v. Edlin*, 4 Ad. & E. 582, 589, and *Doe d. Cadogan v. Ewart*, 7 Ad. & E. 636, 666, 3 N. & P. 197, this court narrowed the rule of holding the trust estate to determine after the time for performance of the trusts, in the manner which I now suggest as the proper one, namely, to the case in which that restriction is consistent with the words of the instrument, and the apparent intention of the maker." In *Fenner v. Hepburn*, 2 You. & C., Chan. Cas. 159, it was held, that although an agreement between an intended lessor and lessee may *possibly amount at law to a present demise or assignment, yet, if upon the face of the instrument it appears that a further instrument is necessary to carry the intention of the parties into execution, a court of equity will decree specific performance of the agreement in that particular. In the case of a bargain and sale, insufficient for want of enrolment, it is every day's experience to go to equity to cure the defect, and so carry out the intention of the parties. Some principles applicable to the present case will be found in *The Marquess of Bute v. Thompson*, 18 M. & W. 487, and *Doe d. The Marquess of Bute v. Guest*, 15 M. & W. 160.

WILDE, C. J. Upon the best consideration which the court can give to the question which the parties desire to have decided in this case, the conclusion they have come to, is, that the rule cannot be made absolute. We give no opinion upon the first point which was argued, viz. whether it is competent to the court to entertain the question whether the umpire had come to a correct conclusion, under the statute. For the present, we pass that wholly by: when it becomes necessary to deal with that question, we shall be prepared to decide it. The principle of construction which has been so strenuously contended for, viz. that the terms of

(a) *Dann v. Spurrier*.

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(b) *Goodright d. Hall v. Richardson*, 3 T. R. 462.

a grant are to be construed as favourably as possible for the grantee, the court is not disposed to controvert. Nor will it be denied that the whole of an instrument must be looked at together, when we are endeavouring to arrive at the intentions of the parties. In the conclusion at which we have arrived, we fully adopt both these principles. By the instrument in question, Dr. Fellowes professes to let, and Stroud to hire, the land, *530] no mention being made of any term. Passing over the clause as to *the taking of the brick-earth, it has not been contended, nor could it be, that the agreement does more than create a tenancy at will, or from year to year. Nor can I discover anything to lead me to conclude that the parties contemplated any future instrument. If, then, the agreement, so looked at, enures only to the extent which I have stated, what is the effect of the clause as to the taking of the brick-earth? The tenant, it is said, agrees to hire the land for the purposes of his trade of a brick-maker. I do not know enough of the trade to form an opinion as to whether it would be prudent for a brick-maker to agree to pay a large rent for an extended term. But I should incline to think it would be more prudent to take it determinable by a notice. But we cannot speculate upon this. It seems to me that the parties did not contemplate a more extended interest than that of a tenancy from year to year; otherwise, the tenant being under no obligation to work out the brick-earth, he might, so long as he chose to pay a rent equal to 8s. per thousand for four millions of bricks, hold on for ever. That would be making the agreement equal to a grant of the fee-simple. No premium seems to have been paid; if there had been, it might have tended to show that a larger interest was intended to pass than a tenancy from year to year. There is no power of distress: nor is the tenant under any obligation to work out the brick-earth: neither is there any reservation of a right on the part of the landlord to re-enter, if the rent is not paid, or in any other event. How, then, can it be supposed that the landlord ever intended to part with a permanent interest in the land? The cases referred to, where courts of equity have been dealing with executory agreements, appear to me to be wholly beside this. The argument that has been urged on the part of Mr. Stroud, resolves itself into *531] this,—that the agreement is ambiguous, and therefore the *court is at liberty to consider what was the probable intention of the parties. I do not, however, find any ambiguity upon the face of the agreement: nor do I see any reason for giving it any effect beyond what is warranted by its language.

One ground upon which it has been urged that the rule should be made absolute, is, that the arbitrator rejected evidence of the custom of the brick-making trade with respect to the hiring of land. I cannot, however, see upon what principle evidence of that sort could be held to be admissible: it is much too uncertain, and it is by no means applicable where there has been a distinct agreement.

Upon the whole, I do not think that the case is attended with any very great difficulty. The umpire has put the proper construction upon the agreement.

The rest of the court concurring,

Rule discharged.

J. Brown, on behalf of the company, asked that the rule might be discharged *with costs*: but

WILDE, C. J., observed, that, inasmuch as both parties seemed to have desired the umpire to raise the question upon the face of his award, it was not a case for costs.

Rule discharged, without costs.

*BERRY v. IRWIN. Nov. 20.

[*532

The adjudication of the commissioner under the insolvent debtors act, 1 & 2 Vict. c. 110, s. 90, discharges the insolvent from all debts due or growing due at the time of the petition, to creditors, or to persons claiming to be creditors.

An insolvent inserted in his schedule the name of A., in whose hands he had placed two bills of exchange for the purpose of their being discounted. After the schedule was filed, he discovered that A. had endorsed the bills to B., and accordingly obtained leave to amend the schedule by inserting B.'s name therein, stating the circumstances under which the bills came to B.'s hands. B. sued the insolvent on the bills, and obtained a verdict at the assizes against him on the morning of the day on which the order of adjudication was made, and proceeded thereon to judgment and execution:—Held, that the insolvent was entitled to be discharged as to the action, both in respect of debt and costs,—although the costs were incurred after the filing of the petition.

The defendant was arrested in the month of April last, on a writ of *capias ad satisfaciendum*, and on the 24th of May filed his petition in the insolvent debtors court, for relief under the 1 & 2 Vict. c. 110, and obtained a vesting order thereon. On the 18th of June, he duly filed his schedule, inserting therein one H. Melton as a creditor for 250*l.*, as drawer and payee of two bills of exchange, one for 150*l.*, the other for 100*l.*, dated respectively the 10th and 12th of April last, and accepted by the defendant. On the 4th of July, the defendant was served with a writ of summons, at the suit of the plaintiff, in an action brought by him as endorsee of these two bills. The defendant's petition came on for hearing before the insolvent debtors court on the 18th of July, when the further hearing was adjourned till the 31st. The defendant thereupon amended his schedule, by inserting therein the name of Berry (the plaintiff) as a creditor for the amount of the two bills and the costs of the action,—and stating that the bills were endorsed to him without consideration, and after they had arrived at maturity; and, on the 31st of July, Berry, who had been served with notice, attended to oppose the defendant's discharge. The hearing of the defendant's petition was

*533] again adjourned until the 7th *of August,—on which day it was adjudged and ordered by the court, that the defendant should be discharged from custody, and entitled to the benefit of the act forthwith, as to the debt or claim of the said H. Melton and of the plaintiff, in respect of the said two bills of exchange, and from all other debts and claims inserted in his schedule, with the exception of two.

The plaintiff proceeded with the action, and the cause was tried as an undefended cause, at the last Surrey assizes on the 7th of August,—a few hours before the defendant's discharge was pronounced,—when a verdict was found for the plaintiff for the amount of the bills and interest, and an order for speedy execution obtained. And on the 1st of September, the plaintiff lodged with the keeper of the Queen's Prison a writ of *habeas corpus* for the purpose of charging the defendant in execution upon that verdict.

Miller, on a former day in this term, obtained a rule calling upon the plaintiff to show cause why the defendant should not be discharged from the custody of the keeper of the Queen's Prison, as to this action, and why the plaintiff should not pay the costs of the application. He referred to the 79th section of the act, which enacts "that the discharge of any prisoner so adjudicated as aforesaid (s. 75) shall and may extend to all process issuing from any court for any contempt of any court, ecclesiastical or civil, for non-payment of money, or of costs or expenses, in any court, ecclesiastical or civil; and that, in such case, the said discharge shall be deemed to extend also to all costs which such prisoner would be liable to pay in consequence, or by reason, of such contempt, or on purging the same; and that every discharge so adjudicated as aforesaid as to any debt or damages of any creditor of such prisoner, *534] shall be deemed to extend also to all costs incurred by such *creditor before the filing of such prisoner's schedule, in any action or suit brought by such creditor against such prisoner for the recovery of the same: and that all persons as to whose demands for any such costs, money, or expenses as aforesaid any such person shall be so adjudged to be discharged, shall be deemed and taken to be creditors of such prisoner in respect thereof, and entitled to the benefit of all the provisions made for creditors by this act, subject nevertheless to such ascertaining of the amount of the said demands as may be had by taxation or otherwise, and to such examination thereof as is herein provided in respect of all claims to a dividend of such insolvent's estate and effects."

Lush now showed cause. This is not a case in which the statute operates to discharge the insolvent from the plaintiff's claim. By the 69th section, the insolvent is required to file a schedule containing, amongst other things, "a full and true description of all debts *due or growing due* from such prisoner at the time of making such order [the vesting order], and of all and every person and persons to whom such prisoner shall be indebted, or who to his knowledge or belief shall claim

to be his creditors, together with the nature and amount of such debts and claims respectively, distinguishing such as shall be admitted from such as shall be disputed by such prisoner." By s. 75, the adjudication of the commissioner enures as a discharge "as to the several debts and sums of money due, or claimed to be due, at the time of making such vesting order as aforesaid, from such prisoner to the several persons named in his schedule as creditors, or claiming to be creditors, for the same respectively, or for which such persons shall have given credit to such prisoner before the time of making such vesting order as aforesaid, and which were not then payable, and as to the claims of all other *persons not known to such prisoner at the time of such adjudication, who may be endorsees or holders of any negotiable security [*535 set forth in such schedule so sworn to as aforesaid." (a) And the 90th section enacts, "that no person who shall have become entitled to the benefit of this act by any such adjudication as aforesaid, shall at any time hereafter be imprisoned by reason of the judgment so as aforesaid entered up against him or her according to this act, (b) or for or by reason of any debt or sum of money or costs, with respect to which such person shall have become so entitled, or for or by reason of any judgment, decree, or order for payment of the same; but that, upon every arrest or detainer in prison upon any such judgment so entered up as aforesaid, or for or by reason of any such debt or sum of money, or costs, or judgment, decree, or order for payment of the same, it shall be lawful for any judge of the court from which any process shall have issued in respect thereof, and such judge is hereby required, upon proof made to his satisfaction that the cause of such arrest or detainer is such as hereinbefore mentioned, to release such prisoner from custody, unless it shall appear to such judge, upon inquiry, that such adjudication as aforesaid was made without due notice, where notice is by this act required, being given to, or acknowledged by, the plaintiff on such process, or being by him dispensed with by the acceptance of a dividend under this act, or otherwise." The demand of this plaintiff was not a debt "due or growing due at the date of the vesting order." [V. WILLIAMS, J. The birth of the debt is, in one sense, the drawing of the bills.]

Assuming that this was a debt due, or growing due, at the time of the making of the vesting order, the discharge of the insolvent did not enure as a discharge *from the costs of the action. The action was not commenced until after the date of the petition: and the 79th [*536 section,—the only one which applies to costs,—speaks only of costs incurred prior to the filing of the petition. The costs, from which the party has no discharge, forming part of this judgment, the court cannot, without unwarrantably extending the provisions of the statute, make this rule absolute. Besides, the court will not relieve an insolvent, upon a summary application, where he neglects to avail himself of an opportunity

(a) Vide *Lambert v. Smith*, post, T. T. 1851.

(b) Under s. 87.

of pleading his discharge *puis darrein continuance* : Sharp v. D'Almaine, 8 Dowl. P. C. 664. [WILDE, C. J. What opportunity had the defendant here to plead? The matter of defence did not exist at the time the cause was tried.]

Miller, in support of his rule. The defendant is clearly entitled to his discharge, both in respect of the debt and the costs of the action. [MAULE, J. To whom was there a debt due at the date of the vesting order?] There was an inchoate debt, growing due to the party who might ultimately turn out to be the holder of the bills. It is not necessary, upon the fair construction of the statute, that the debt should be due or growing due to a person named in the schedule: the insolvent has no means of knowing who is the holder of the bills. In Reeves v. Lambert, 4 B. & C. 214, the defendant, being indebted to A. for goods sold, accepted a bill drawn by A. for the amount, which became due in October, 1823: before that time, the defendant became insolvent, and presented his petition to be discharged, under the 1 G. 4, c. 119, and, in his schedule delivered into the insolvent debtors court, he stated that he was indebted to A. for goods, and that A. held his acceptance for the amount, which became due in October, 1823. A. had endorsed the bill to B., but the *537] insolvent was ignorant of that fact: B. having brought an action against the insolvent upon the bill, the latter pleaded his discharge under the insolvent debtors act; and it was held that the schedule contained a true description of the person to whom the insolvent was indebted, within the meaning of s. 6,—which required that the insolvent should, within a certain time after presenting his petition, “deliver into the court a schedule containing a full and true description of every person to whom such prisoner shall be then indebted, or who to his or her knowledge or belief shall claim to be his or her creditor.” And the court there say: “This act of parliament must receive a reasonable construction. The law forces no man to do impossible things; and there may be many cases where it would be impossible for a prisoner to insert in his schedule the name of the particular holder of a bill. The prisoner in his schedule has given notice to the real creditor; for, he has described the security of which she was the holder. He has, therefore, described the original debt, the original creditor, and the security for that debt. If we were to hold that this schedule did not contain a sufficient description of the persons to whom the prisoner was indebted, there might, in many instances, be an insuperable difficulty in the way of a prisoner's obtaining his discharge. Suppose he had made inquiry of Mrs. Reynolds to whom she had endorsed the bill, and she had refused to tell him; or, suppose that she had told him, and the endorsee had endorsed it over to another, and refused to tell him to whom, it would have been impossible to describe the real holder of the bill.” [WILDE, C. J. Does it appear by the affidavits when the bills were first handed to Melton?] Not very distinctly. They were in his hands at the date of the vesting order: that appears from

the schedule. The defendant is clearly within the 90th section of the statute.

*Then, being entitled to his discharge from the debt, he is, by force of the 79th section, discharged from the costs also. The [*538 judgment is entire: if the defendant is improperly detained in respect of part, he is entitled to be discharged altogether. In *Tilby v. Best*, 16 East, 168, it was held, that, if judgment be entered up for the penalty of a bond given to secure an annuity, and the defendant is taken in execution thereon, when the warrant of attorney under which such judgment was entered up only authorized the taking out of execution for the arrears, the court will set aside the execution *in toto*, and not merely discharge the defendant *pro tanto*. [WILDE, C. J. In *Vansandon v. Corsbie*, 1 Chitt. Rep. 16,(a) BAYLEY, B., says: "It is quite clear, that, if you sue for a debt which carries interest, and obtain judgment, and the party afterwards becomes a bankrupt (the original debt being provable under the commission), and he obtains his certificate, the interest and subsequent costs are not severable from the original debt, but the whole is barred by the certificate." So, in *Holding v. Impey*, 7 J. B. Moore, 614, where a commission of bankruptcy having been sued out against the plaintiff, he brought an action of trespass against the commissioners for false imprisonment, and was nonsuited, and they entered up judgment accordingly, and the commission was afterwards superseded, on which another commission was sued out, founded on the same act of bankruptcy as the first, under which second commission the plaintiff obtained his certificate, and the defendants afterwards charged him in execution for the costs of the nonsuit,—it was held that he was entitled to be discharged out of custody, such costs being *provable under the second commission.] It is quite clear that the costs must follow the fate of the original debt, [*539 even without the aid of the 79th section. *Cur. adv. vult.*

WILDE, C. J., now delivered the judgment of the court.(b)

The court is of opinion that the defendant is entitled to his discharge from custody as to this action. It appears from the 69th section of the statute 1 & 2 Vict. c. 110,—which prescribes what shall appear in the insolvent's schedule,—that it is the duty of the party to state therein, not only the names of those persons who are creditors, but also the names of those who claim to be creditors, or whom he believes to claim to be creditors, but whose claims he does not admit. Here, it was stated in the schedule, as originally filed by the defendant, that one Melton claimed to be a creditor in respect of two bills of exchange which had been delivered to him by the insolvent for the purpose of getting discounted, and the proceeds of which Melton had applied to his own use,—thereby importing that Melton had negotiated the bills. It does not appear

(a) S. C. per nom. *Van Sandau v. Corsbie*, 3 B. & Ald. 18. And see *Van Sandau v. Corsbie*, in C. P., 2 J. B. Moore, 602.

(b) The judges who were present at the argument, were, WILDE, C. J., MAULE, J., V. WILLIAMS, J., and TALFOURD, J.

when the bills were given to Melton ; but, looking at the dates of the bills, it is probable that they were negotiated before the 24th of May, the day on which the defendant filed his petition in the insolvent debtors court, and the vesting order was obtained. The defendant afterwards amended his schedule, and stated therein that the present plaintiff claimed to be a creditor in respect of the same two bills, and also stated that the bills were, as the defendant believed, endorsed by Melton to the plaintiff *540] after maturity, and without *consideration. Now, the 75th section, which speaks of the adjudication, empowers the insolvent debtors court to discharge the party from the several debts due, or claimed to be due, at the time of the vesting order, to the persons mentioned in the schedule, and to any other persons not known to the petitioner, who may be the endorsees or holders of any negotiable security set forth in such schedule. In this case, as soon as the defendant discovered that the plaintiff claimed to be endorsee of the bills in question, he, by leave of the insolvent court, amended his schedule, and inserted his name therein as a person claiming to be a creditor. The order of adjudication afterwards made, was made with reference to the schedule so amended. It appears to us, therefore, that the insolvent did all he could be required to do. There is nothing to induce us to believe that he knew the plaintiff to be the holder of the bills at the time he filed his petition, or that he has withheld from us any information he could have given. On the other hand, the plaintiff gives us no information whatever, though it appears he was in attendance at the time the order of adjudication was made.

With respect to the costs—the defendant clearly is discharged from the judgment. The 79th section, which provides for costs, after referring to attachments of contempt, proceeds to enact “that every discharge so adjudicated as aforesaid as to any debt or damages of any creditor of such prisoner, shall be deemed to extend also to all costs incurred by such creditor *before the filing of such prisoner's schedule*, in any action or suit brought by such prisoner for the recovery of the same.” The statute makes no mention of costs incurred subsequently to the filing of the petition ; and for this reason,—that, if the plaintiff proceeds after the filing of the petition, he is not entitled to any costs. When a plaintiff *541] proceeds to judgment, the debt or damages, and the costs, *together form one entire demand. We consider the defendant discharged from both by virtue of the 90th section.

As to the costs of this application,—the case stands thus:—The defendant has obtained his discharge under the insolvent debtors act ; and the plaintiff has, notwithstanding, proceeded to judgment, and lodged a detainer against him. The defendant, under the circumstances, could not do otherwise than come to the court for relief ; and therefore we think he is entitled to have the rule made absolute, in the terms in which it was moved.

Rule absolute, with costs.

LEWIS v. CAMPBELL. Nov. 21.

A., being indebted to B., gave him an order upon C., his agent, who, upon its being presented, declined to pay it, but said he would set it off against a larger debt due from B. to one D., for whom C. was authorized to collect debts. C. accordingly credited B. with the amount mentioned in the order, and debited the account of D. with that amount; and D. afterwards gave A. a letter of indemnity against any proceedings B. might take against him in respect of his debt. B. having subsequently sued A., and obtained judgment against him (the action being defended in A.'s name by D.), A. paid the amount, to avoid an execution:—
Held, that the circumstances raised an implied request by D. to A. to pay the money; and that the sum so paid, was recoverable against D. in an action for money paid by A. to D.'s use.

THIS was an action of debt, for money paid, money had and received, and on an account stated. The defendant pleaded that she was never indebted.

The cause was tried before WILDE, C. J., at the London sittings after Hilary term, 1848, when the material facts appeared to be, that the plaintiff, John William Lewis, being indebted to Richard Duke in 112*l*. 16*s*. 6*d*., gave him an order for payment of that sum, on Macdonald & M'Queen, who were agents to the plaintiff. When Duke presented the order for payment *Macdonald & M'Queen refused to pay the [*542 money, but told Duke that they would pay the amount to Mrs. Campbell, the defendant, for whom they were authorized to collect debts, in part payment of a debt of 350*l*., which the defendant claimed as due to her from Duke. Macdonald & M'Queen accordingly debited the plaintiff, and credited the defendant, with the amount of the order, and gave the plaintiff, on behalf, and in the name of, the defendant, on the 29th of August, 1843, a letter stating that the sum of 112*l*. 16*s*. 6*d*., owing by the plaintiff to Duke, being attached by her in the hands of the plaintiff's agents, she undertook to exonerate and bear him harmless against any steps which Duke might take against him in respect of that sum. These transactions were communicated to the defendant, who approved of what her agents had done, and claimed the amount mentioned in the order, as a debt due to her from Macdonald & M'Queen, and received a dividend on it, when they became bankrupts. Afterwards, in 1846, an action was brought by Duke against the present plaintiff, which was defended, in his name, and by his permission, by Mrs. Campbell, the present defendant,—pleading, amongst other things, that the debt due from the plaintiff to Duke had been paid, by his consent, to the present defendant. This defence, however, was unsuccessful; and the present plaintiff was compelled to pay 160*l*. 13*s*. 6*d*., the amount for which Duke obtained judgment, in order to avoid being taken under a *capias ad satisfaciendum*.

Upon this state of facts, a verdict was taken for the plaintiff for 160*l*. 13*s*. 6*d*., with liberty to the defendant to move to enter a nonsuit, or to reduce the verdict to 112*l*. 16*s*. 6*d*.

Byles, Serjt., in Easter term, 1848, obtained a rule nisi accordingly.

*543] He submitted that the action for *money paid, or money had and received, would not lie, under the circumstances, the order given by Lewis to Duke never having in fact produced money : and he referred to *Stephens v. Badcock*, 3 B. & Ad. 354, *Spencer v. Parry*, 3 Ad. & E. 381, 4 N. & M. 770, and *Lubbock v. Tribe*, 3 M. & W. 607.

Talfourd, Serjt., and *Montague Smith*, in Trinity term last, showed cause. An action for money paid will lie wherever one man has paid money at the request, either express or implied, of another. In *Howes v. Martin*, 1 Esp. N. P. C. 162, it was held, that, where a party desires an action brought against another person to be defended, in which action he is concerned, and by the event of which he may be benefited, and the action is defended accordingly, and the defence fails, the party at whose request such defence was undertaken is liable to pay the expenses. An opinion to the same effect was intimated by this court in *Williamson v. Henley*, 6 Bingh. 299, 3 M. & P. 731. The principle is well stated by POLLOCK, C. B., in delivering the judgment of the court in *Brittain v. Lloyd*, 14 M. & W. 762. "If," says his lordship, "one requests another to pay money for him to a stranger, with an express or implied undertaking to repay it, the amount, when paid, is a debt due to the party paying, from him at whose request it is paid, and may be recovered on a count for money paid; and it is wholly immaterial whether the money is paid in discharge of a debt due to the stranger, or as a loan, or gift, to him; on which two latter suppositions the defendant is relieved from no liability by the payment. The request to pay, and the payment according to it, constitute the debt; and, whether the request be direct, as, where the *544] party is expressly desired by the *defendant to pay, or indirect, where he is placed by him under a liability to pay, and does pay, makes no difference. If one ask another, instead of paying money for him, to lend him his acceptance for his accommodation, and the acceptor is obliged to pay it, the amount is money paid for the borrower, although the borrower be no party to the bill, nor in any way liable to the person who ultimately receives the amount. The borrower, by requesting the acceptor to assume the character which ultimately obliges him to pay, impliedly requests him to pay, and is as much liable to repay, as he would be on a direct request to pay money for him, with a promise to repay it. In every case, therefore, in which there has been a payment of money by a plaintiff to a third party, at the request of the defendant, express or implied, on a promise, express or implied, to repay the amount, this form of action is maintainable." [MAULE, J. *Spencer v. Parry*, if good law, reduces you to the necessity of showing some other ground than release of liability.] PATTESON, J., in that case, says: "If a man pays a debt for another, at his request, no doubt he may recover the amount as money paid." There was ample evidence of request here. The amount would be recoverable also under the count for money had and received: *Andrew v. Robinson*, 3 Campb. 199; *Glyn v. Baker*, 13 East, 509.

[WILDE, C. J., referred to *Howell v. Batt*, 5 B. & Ad. 504, 2 N. & M. 381.]

Byles, Serjt., and *A. Pollock*, in support of the rule. Money paid lies only where there has been a distinct request by the party to pay the money, and the payment is made in consequence, or where the payment is made in discharge of a legal liability contracted by the *party [*545 paying it, at the request, express or implied, of the defendant. [MAULE, J. Where money is received under circumstances which make it right and equitable that it should be returned, it may be recovered back on a count for money had and received. May it not also be said, that, where money has been paid under circumstances which make it just and equitable that it should be repaid, it may be recovered back on a count for money paid?] It is submitted that it cannot. There clearly was no *express* request on the part of the defendant to pay the money: and none can be implied from the circumstances. *Spencer v. Parry* is directly in point. There, a tenant, by a written agreement under which he took premises, engaged to pay taxes which, by statute, were due from the landlord: he made default; and the landlord, having been obliged to pay, sued him for the amount as money paid to his use: and it was held, that, as the landlord was originally liable for the taxes, and was exempted from them only by agreement with the tenant, he should have declared specially on such agreement, and could not recover on the indebitatus count. In delivering the judgment of the court, Lord DENMAN says: "The plaintiff's payment relieved the defendant from no liability but what arose from the contract between them. The tax remained due by his default, which would give a remedy on the agreement: but it was paid to one who had no claim upon him, and therefore not to his use." Mr. Baron PARKE, in *Lubbock v. Tribe*, treats that case as laying down the correct principle. [MAULE, J. The principle which my brother PARKE there means to refer to, is, that, where there is no other ground upon which to rest the right to recover the money, than the release from a liability, you must, in order to sustain the action, show that there has been a release from liability.] In *Cumming v. Bedborough*, 15 M. & W. 488, *it was held, that, where a tenant pays property-tax assessed [*546 on the premises, and omits to deduct it in his next payment of rent, he cannot afterwards recover the amount as money paid to the use of the landlord.

The plaintiff clearly is not entitled to recover on the count for money had and received. If received to the use of any one, it was received to the use of Duke. There was no assent on the part of the defendant to make it money had and received to the use of the plaintiff: *Williams v. Everett*, 14 East, 582; *Wharton v. Walker*, 4 B. & C. 163, 6 D. & R. 288; *Shaw v. Picton*, 4 B. & C. 715, 7 D. & R. 201; *Lee v. Merrett*, 8 Q. B. 820.

At all events, the defendant cannot be held liable for the costs of the former action.

Cur. adv. vult.

WILDE, C. J., now delivered the judgment of the court [after stating the facts, *ut ante*]:—

The argument turned mainly upon the question, whether the count for money paid, was sustained by the facts in evidence. And in the view we take of the case, it will not be necessary to discuss any other question. It appears to us, that the defendant, being bound by her guarantee to indemnify the plaintiff against Duke's action, and the plaintiff having, at the request of the defendant, taken upon himself the character of defendant in that action, and having permitted the defendant to conduct the defence, and the defendant having acted on that permission, an implied contract was raised on the part of the defendant, to pay anything which might be necessary, in the event of a judgment being obtained against the defendant, for the protection of the plaintiff against the consequences of that judgment; and, in the event of the defendant's failure *547] to make such payment, *that an authority from her was to be implied, authorizing the plaintiff to make the payment for her, so as to make it money paid to her use.

Thus it was, that, in the case of *Howes v. Martin*, 1 Esp. N. P. C. 162, where the plaintiff had accepted a bill for the defendant, and had, at his request, defended an action brought on the bill, and had paid the debt and costs recovered in that action, Lord KENYON held that the amount was money paid by the plaintiff to the use of the defendant, on the ground that, as the defendant was personally interested, and had directed the defence to be made, by which he might have been benefited, the money must be considered to have been laid out by the plaintiff on his account and to his use.

In the case of *Brittain v. Lloyd*, 14 M. & W. 762, the plaintiff, an auctioneer employed by the defendant to sell some property, had incurred a liability to pay the auction-duty, and had been compelled to pay it; and the court held that he might recover the amount as money paid to the defendant's use. The reason of that decision appears to us to comprehend the present case. "It is clear," the court says, in its judgment, "that if one requests another to pay money for him to a stranger, with an express or implied undertaking to repay it, the amount, when paid, is a debt due to the party paying, from him at whose request it is paid, and may be recovered on a count for money paid; and it is wholly immaterial whether the money is paid in discharge of a debt due to the stranger, or as a loan or gift to him; on which two latter suppositions the defendant is relieved from no liability by the payment. The request to pay, and the payment according to it, constitute the debt; and whether the request be direct, as where the party is expressly *548] desired by the defendant to pay, or indirect, where he *is placed by him under a liability to pay, and does pay, makes no differ-

ence. If one asks another, instead of paying money for him, to lend him his acceptance for his accommodation, and the acceptor is obliged to pay it, the amount is money paid for the borrower, although the borrower be no party to the bill, nor in any way liable to the person who ultimately receives the amount. The borrower, by requesting the acceptor to assume that character which ultimately obliges him to pay, impliedly requests him to pay; and is as much liable to repay, as he would be on a direct request to pay money for him, with a promise to repay it."

The case mainly relied on by the defendant, on the argument of the present case, was that of *Spencer v. Parry*, 3 Ad. & E. 381, 4 N. & M. 770, where the plaintiff had let a house to the defendant, at a rent of 42*l.*, "free and clear of all land-tax and parochial taxes:" the defendant left the premises without paying the taxes, which the plaintiff, under certain local acts, was compelled to pay: the court held that this money could not be recovered under a count for money paid to the defendant's use; but that the plaintiff ought to have sued on the express agreement to pay 42*l.* clear of all land-tax, &c., remarking (with reference to certain cases in which money paid to relieve a defendant from a liability under which he lay to a third person for payment of money, was recovered under the count for money paid) that "here the plaintiff's payment relieved the defendant from no liability but what arose from the contract between them; the tax remained due by his default, which would give a remedy on the agreement, but it was paid to one who had no claim upon him, and therefore not to his use."

If the Court of Queen's Bench in that case are to be considered as deciding, generally, that an action for money paid would lie in no case where the defendant *was not relieved from a liability to a third person, the decision would apply to the present case, but certainly [*549 could not be maintained, inasmuch as there are many cases, as observed by the court in the case of *Brittain v. Lloyd*, in which the action can be maintained, though the defendant has not been relieved from a liability; *i. e.* all the cases in which, though no such relief from liability occurs, a request to pay, and a promise to repay, are expressed or implied.

But the Court of Queen's Bench is not, as we understand the case of *Spencer v. Parry*, to be taken to have decided any such general proposition in that case; the remark above cited being intended only to show that the ground for an inference of a request to pay and a promise to repay, which is afforded by a compulsory payment to a third person, by the plaintiff, of a debt due to that third person by the defendant, as in *Exall v. Partridge*, 8 T. R. 308, where the plaintiff's goods had been distrained for rent due from the defendants, could not exist in the case of *Spencer v. Parry*. That case was decided for the defendant, not in the absence of *that* ground only, but because the court were of opinion that neither *that* ground nor any other on which an inference of a request to pay and promise to repay, could be sustained, was to be found in that case.

In that case, the liability of the plaintiff to pay the taxes was not incurred at the request of the defendant, but was antecedent to, and was not affected by, the transaction between the plaintiff and defendant: and the court by no means decided that, if the plaintiff incurs a liability *at the request of the defendant*, though for a payment to which the defendant was not previously liable, money paid would not lie. In the argument of *550] that case, a case having been referred to, where *an action had been defended by the plaintiff at the request of the defendant, in which the plaintiff had been obliged to pay the costs, PATTESON, J., observed, that, in that case, the action had been defended at Hemley's (the defendant's) request; adding, if a man pays a debt for another, at his request, no doubt he may recover the amount as money paid.

We do not think that the present case is open to the objection, that the defendant, having expressly agreed to indemnify the plaintiff, can be sued only on the special contract, and that no implied contract to support a count for money paid is to be inferred from that agreement; for, even if it were to be conceded that such a count could not be supported by the evidence of a contract to indemnify, in the terms of the letter of August, 1848, and the payment by the plaintiff, *alone*, we think there is good ground for such an inference in the present case, where, after the special agreement, the plaintiff permitted the defendant to defend the action in his name. From such permission, and from the conduct of the defendant in acting upon it, we think an authority to pay on account of the defendant such sum as the plaintiff might be compelled to pay Duke, to relieve himself from a *capias ad satisfaciendum*, and a promise to repay it, are to be inferred, supposing them not to be included in the special contract to indemnify.

For these reasons, we think the rule must be discharged.

Rule discharged.(a)

(a) And see F. N. B. 108 B., 122 K., 135 A., 162 C., 234 H.; *Winckworth v. Mills*, 2 Rep. N. P. C. 484.

*551]

*READ v. BLAYNEY. Nov. 20.

The plaintiff, on the 7th of June, recovered a verdict for 9*l.* 2*s.* 1*d.* in an action of contract, before the under-sheriff. The writ of trial was returnable on the 8th:—Held, that the defendant was in time on the 11th of June, to move to enter a suggestion, under the 9 & 10 Vict. c. 95, s. 129, to deprive the plaintiff of costs; and that it was not necessary first to move to set aside the judgment, if any.

The plaintiff, having signed judgment and issued a *fi. fa.* for the damages and costs on the 11th of June, and the defendant having paid the amount under protest,—the court afterwards made absolute a rule calling upon the plaintiff to refund the costs.

At the trial, before the under-sheriff of Middlesex, on the 7th of June last, the plaintiff recovered a verdict for 9*l.* 2*s.* 1*d.*, the action being on contract. Application was made to the under-sheriff to stay the pro-

ceedings, in order to enable the defendant to apply to this court for leave to enter a suggestion to deprive the plaintiff of costs, under the 9 & 10 Vict. c. 95, s. 129. That application was refused. The writ of trial was returnable on the 8th of June; judgment was signed on the 11th.

Corrie, on the 11th of June, obtained a rule calling upon the plaintiff to show cause why, upon payment by the defendant of the 9*l.* 2*s.* 1*d.*, the damages recovered on the trial of this cause, without costs, all further proceedings should not be stayed; or why the plaintiff should not forthwith carry in the record, and the defendant be at liberty to enter a suggestion thereon to deprive the plaintiff of his costs, the verdict on the trial being for a less sum than 20*l.*, and for the recovery of which a plaint might have been entered in a county-court pursuant to the statute 9 & 10 Vict. c. 95.

Joyce now showed cause. He submitted, upon the authority of *Soames v. Cooper*, 8 Exch. 88, *Smith v. Roberts*, 8 Exch. 89 (a), 18 Jurist, 40, and *Vicars v. Mould*, 18 Jurist, 85, that it is not competent to a [*552 *defendant to move to enter a suggestion under this statute, without also moving to set aside the judgment, in case judgment has been signed. He also objected that the rule was improperly drawn up "upon reading the writ of trial;" for that the writ of trial was not in court until it was returned, that is, when judgment is signed.

Corrie, in support of his rule. The defendant made this application within four days after the return of the writ of trial. He was therefore clearly in time: and the rule is correct in point of form. In *King v. Erle*, 5 Dowl. P. C. 595, the Court of Exchequer permitted a suggestion to be entered to deprive the plaintiff of costs, *after final judgment and writ of execution issued*, where it appeared that the defendant could not apply sooner. So, in *Johnson v. Beale*, 5 M. & W. 276, it was held, that, where a cause is tried before the sheriff under a writ of trial, and judgment is signed thereon in vacation, the defendant may apply to the court in the following term, to enter a suggestion on the roll for the purpose of obtaining costs, under a court of requests act, although no application was made to the sheriff for a certificate to stay the judgment and execution, under the 3 & 4 W. 4, c. 42, s. 18, the court saying—"It is clear that, if this had been a case at nisi prius, the defendant would not have been too late to enter a suggestion on the roll; and writs of trial must stand in this respect on the same footing as causes tried at nisi prius. *Baddley v. Oliver*, 1 C. & M. 219, 1 Dowl. P. C. 598, shows that the suggestion may be made even after judgment has been signed and execution issued on a judge's order."

WILDE, C. J. I think this rule must be made absolute to enter a suggestion in the terms prayed, the affidavit *bringing the case [*553 within the statute. And I am of opinion that the motion is made in time, having been made within four days after the return of the writ of trial. I also think there is no incongruity in the rule being drawn

up "upon reading the writ of trial." It was returnable on the 8th of June, and was open to the view of the court on that day.

The rest of the court concurring,

Rule absolute.

Corrie, on a subsequent day (Nov. 26th),—upon an affidavit that the costs were taxed at 13*l.* 3*s.* 6*d.*, and execution issued for that amount, together with the debt, 9*l.* 2*s.* 1*d.*, and that those sums had been paid to the sheriff, under protest, and with notice of the rule of the 11th of June,—obtained a rule calling upon the plaintiff to show cause why the 13*l.* 3*s.* 6*d.* should not be refunded, together with the costs of the application.

In the following Hilary term, that rule was made

Absolute.

SLATER v. MACKAY. Nov. 26.

It is no answer to a motion, under the 43 G. 3, c. 46, s. 4, for the costs of an action upon a judgment, that the original cause of action (in which the defendant had suffered judgment by default) was one for which the plaintiff might have levied a plaint in the county-court, under the 9 & 10 Vict. c. 96.

THE plaintiff having obtained a judgment by default against the defendant in an action in this court for 15*l.* 3*s.* 6*d.* debt, and 5*l.* 12*s.* 6*d.* costs, brought an action of debt against him upon that judgment, to which the *defendant pleaded *nul tiel record*. Issue being joined on that *554] plea, and a day given to produce the record, the plaintiff had judgment.

Needham, on a subsequent day, obtained a rule calling upon the defendant to show cause why he should not pay to the plaintiff the costs of the last-mentioned action, under the statute 43 G. 3, c. 46, s. 4.(a) The motion was founded upon an affidavit which stated, amongst other things, that the defendant held an appointment in one of the public offices at a salary sufficient to enable him to pay the plaintiff his demand; that he was residing in ready-furnished apartments; and that the only probable mode of compelling speedy payment of the debt was by proceeding to judgment, on which a *ca. sa.* might be issued. *Mason v. Nicholls*, 14 M. & W. 118, was referred to.

H. Mills now showed cause, upon an affidavit of the defendant, which stated, amongst other things, that the defendant was a clerk in the Ord-

(a) Which enacts, that, "in all actions which shall be brought upon any judgment recovered or which shall be recovered, in any court of England, &c., the plaintiff or plaintiffs in such action on the judgment shall not recover or be entitled to any costs of suit, unless the court in which such action on the judgment shall be brought, or some judge of the same court, shall otherwise order."

nance-Office in the Tower of London, and was so on the 10th of July last, when the writ of summons in the first-mentioned action was issued; that the residence and dwelling-place of the deponent, at the time of the issuing of the said writ of summons, and thence hitherto, and at which he had thence hitherto continually dwelt and resided, was at No. 10 Robert Street, King's Road, Chelsea, in the county of Middlesex, and was so for nearly two months *previously; that, before and at the time of the issuing and service of the said writ, and thence [*555 hitherto, the deponent was in the habit of attending at the Ordnance-Office in the discharge of his duty as a clerk in such office, and did then carry on his business as such clerk, and was in the daily habit of proceeding to and from his residence in Robert Street aforesaid to the Ordnance-Office aforesaid; that the plaintiff and his attorney were during all that time well aware that the deponent was such clerk as aforesaid, and was in the habit of attending at such office as aforesaid; that the deponent was described as of the Ordnance-Office, Tower, in the writ of summons; that the residence and dwelling-place of the deponent at the time of the issuing of the writ was, and still is, within the jurisdiction of the Brompton County-Court of Middlesex; that the Ordnance-Office at the Tower was and is within the jurisdiction of the Whitechapel County-Court of Middlesex; that the debt claimed in the first-mentioned action amounted only to 15*l.* 3*s.* 6*d.*, and that the deponent was liable and ought to have been sued in respect of the said debt in one or the other of the above-mentioned county-courts, and not in this court, or in any other of the courts at Westminster; that No. 10 Robert Street, Chelsea, and also the Ordnance-Office in the Tower of London, are both within the distance of twenty miles from Kensington, the place of business and residence of the plaintiff, that is to say, No. 10 Robert Street being within the distance of three miles, or thereabouts, and the Ordnance-Office in the Tower being within seven miles from Kensington aforesaid; that the (original) cause of action arose wholly within the jurisdiction of the Brompton County-Court of Middlesex; and that the plaintiff's motive in bringing the action in this court, and not in the county-court, was, to increase expense, in order that the plaintiff might found an action for more than 20*l.* on the judgment.

*Where the plaintiff has in any way acted oppressively or with bad faith, the court will not allow him the costs of his action upon [*556 the judgment. In *Mason v. Nicholls*, PARKE, B., said: "The creditor clearly had a right, notwithstanding the act, to bring an action on the judgment in the former action,—taking his risk of losing his costs of the second action,—*which the court were not in the practice of giving.*"(a) In *Hanmer v. White*, 12 M. & W. 519, 1 D. & L. 653, the plaintiff having brought an action of debt in the Court of Exchequer, on a judgment recovered in an inferior court, instead of removing it to the superior

(a) And see *Hopkins v. Freeman*, 13 M. & W. 372, 2 D. & L. 447.

court and issuing execution, the defendant pleaded *nul tiel record*: the plaintiff produced the record, and applied for his costs under the 43 G. 3, c. 46, s. 4; but the court refused the application notwithstanding the defendant had pleaded a false plea. The plaintiff, says PARKE, B., "has brought the expense upon himself, and he must pay for the pleasure of bringing the action on the judgment." So, in *Hall v. Pierce*, 5 Dowl. P. C. 603, where the defendant had been superseded through the neglect of the plaintiff, the Court of Exchequer refused to allow him the costs of an action on the judgment, although the defendant had caused delay and expense by pleading a false plea. The only authority opposed to these, is *Garnwell v. Barker*, 5 Taunt. 264. These cases show that misconduct on the part of the defendant in offering a false or dilatory defence, is not regarded by the court, where the plaintiff has misconducted himself. [MAULE, J. What misconduct was the plaintiff guilty of?] Bringing an action in the superior court, for a matter which ought to have been disposed of in the county-court. [MAULE, J. If the *557] cause had been tried in the superior court, there might have been a certificate under the 129th section of the 9 & 10 Vict. c. 95, that the cause was fit to be tried in the superior court. We cannot assume that it was not. The defendant pleads *nul tiel record* merely for delay. And now, when his means are in issue, he omits to tell us what they are. *Wise*, for the plaintiff, referred to *Reed v. Shrubsole*, 7 Man. Gr. & S. 630, 6 D. & L. 707, where it was held that the county-court act does not apply to cases of judgment by default.] In *Reed v. Shrubsole*, one member of the court dissented from the judgment. In *Newton v. Banks*, 17 Law Journ. N. S., Q. B. 187, by a court of requests act, (a) it was provided that a plaintiff, suing in any of the courts at Westminster, for a cause of action recoverable in the court of requests, should not be entitled to any costs if he succeeded: and it was held, on error brought on a judgment in the Court of Queen's Bench for debt and costs, the fact of the defendant's being resident within the jurisdiction of, and liable to be sued in, the court of requests, being assigned as error, and the plea being *in nullo est erratum*, that the judgment, so far as regarded the costs, was erroneous. Here, the defendant's affidavit shows, that, at the time the original action was brought, he was resident within the jurisdiction of, and liable to be sued in, the Brompton County-Court of Middlesex.

WILDE, C. J. The statute 7 & 8 Vict. c. 96, s. 57, has abolished process against the person, where the debt is under 20*l*. The plaintiff in the present case having sued the defendant, in this court, for a debt of 15*l*. *558] 8*s*. 6*d*., obtained judgment against him by default. The defendant, it appears, holds a situation under government, but possesses no available property; and, from a circumstance mentioned in his affidavit, (b) we may fairly infer that process against his person might be

(a) 46 G. 3, c. lxxxviii. s. 14.

(b) That he had called his creditors together, and offered to set apart 60*l*. per annum out of his salary, to liquidate his debts.

productive of advantage to the plaintiff. The plaintiff has, therefore, brought an action of debt upon the judgment. Now, the law says, that, in an action upon a judgment, the plaintiff shall not recover, or be entitled to, any costs of suit, unless the court in which such action on the judgment shall be brought, or some judge of the same court, shall otherwise order. What is to govern the discretion of the court in the matter? Can we have any better ground than that the plaintiff has no other probable means of recovering his debt? The plaintiff, then, adopting the only available means of enforcing his judgment, he is met, not by a plea to the merits, but by a plea of *nul tiel record*. Thus the costs are aggravated by a plea that is false to the defendant's knowledge. By whom, then, ought those additional costs to be sustained? The point is not a new one: the matter has already been discussed in this court, when three of the judges expressed a strong opinion, though one very learned judge entertained doubt. What is the case of *Hall v. Pierce*? The defendant, being sued on a promissory note, put in a plea, and afterwards obtained a summons to stay proceedings, upon payment of debt and costs within a limited time, or the plaintiff to be at liberty to sign final judgment. The costs not being paid, the plaintiff signed final judgment, and sued out a *ca. sa.* for the purpose of fixing the bail. The defendant rendered in discharge of his bail, *and was afterwards superseded*. The plaintiff then brought an action on the judgment; to which the defendant, after obtaining time *to plead, pleaded *nul tiel record*. And the court [*559 say: "The plaintiff is seeking to rectify his blunder in not having charged the defendant in execution. The question, then, is, whether the defendant ought to pay, or the plaintiff to suffer the consequences of his own negligence. If the costs could be separated, *the defendant ought to bear the expenses of his false plea*; but the act gives no power for us to award part of the costs." Apply that here: the defendant has pleaded a false plea; but the plaintiff has been guilty of no default. The case is, therefore, a distinct authority against the defendant. It seems to me, that, in the present case, it was absolutely necessary for the plaintiff so to proceed as to be enabled to sue out process against the person of his debtor, and that, under the circumstances, it would be a denial of justice to withhold from him the costs of this action.

MAULE, J. I also think the plaintiff, in bringing an action upon the judgment in this case, adopted the only course that was reasonably open to him to enforce his rights. The defendant sought to stop his proceedings by a plea which was false to his own knowledge; and the plaintiff has been necessarily put to 4*l.* or 5*l.* expense to remove the impediment. The plaintiff has been quite blameless, and I see no reason why he should not have his costs.

V. WILLIAMS, J. I am of the same opinion. In dealing with this statute, the courts must be guided by the particular circumstances of each case, and not by any general practice.

TALFOURD, J., concurred.

Rule absolute.

*560] *NEWNHAM v. BEVER and Another. Nov. 24.

The owner of a rent-charge in lieu of tithes, distraining under the 81st section of the 6 & 7 W. 4, c. 71, and afterwards obtaining judgment in an action of replevin, is not entitled to double costs under the 11 G. 2, c. 19, s. 22; neither, consequently, is he entitled to the "full and reasonable indemnity as to costs," substituted for double costs, by the 5 & 6 Vict. c. 97, s. 2.

CERTAIN goods of Henry Newnham having been distrained for arrears of a rent-charge in lieu of tithes on the lands of Newnham, in Mortimer West, in the county of Hants, he brought replevin, for the purpose of trying the right of the defendants, who claimed such rent-charge as the lessees of Eton College, who claimed to be the improper rectors of the parish of Strathfield Mortimer, and, as such, to be entitled to the great tithes of Mortimer West, which was alleged to be a tithing of Strathfield Mortimer. The action being at issue, the proceedings were stayed by a judge's order, on the 29th of June last, whereby it was ordered, "that, upon payment of 19l. 15s. 5d. rent-charge due from the plaintiff to the defendants, together with costs, to be taxed, and paid in two days after taxation, all further proceedings in this cause be stayed," &c.

Upon the taxation of the costs, it was insisted on the part of the defendants, that, inasmuch as this was an action of replevin, the defendants would, prior to the passing of the 5 & 6 Vict. c. 97, s. 2, (a) have been *entitled to double costs, and that, consequently, they were *561] now entitled, under that statute, to a full and reasonable indemnity as to all costs, charges, and expenses incurred in and about the action, and not merely to costs as between party and party.

On the other hand, it was submitted, that, this being an action of replevin upon a distress, not for rent reserved by demise, but for a rent-charge under the tithe commutation act, 6 & 7 W. 4, c. 71, s. 81, it was not an action in which, but for the statute of Victoria, double costs would be allowed under the 11 G. 2, c. 19; and, consequently, that the plaintiff was only entitled to costs as between party and party: and the master's attention was called to *The Leominster Canal Company v. Norris*, 7 T. R. 500, and *The Leominster Canal Company v. Cowell*, 1 B. & P. 213.

The master, however, taxed the costs upon the principle of the statute 5 & 6 Vict. c. 97, s. 2. The plaintiff thereupon took out a summons to review the master's taxation; and the judge before whom it was returnable, referred the matter to the court. Accordingly, on a former day,

(a) Which enacts, "that so much of any clause, enactment, or provision in any public act, or acts not local or personal, whereby it is enacted or provided that either double or treble costs, or any other than the usual costs between party and party, shall or may be recovered, shall be, and the same are, hereby repealed: provided always, that, instead of such costs, the party or parties heretofore entitled, under such last-mentioned acts, to such double, treble, or other costs, shall receive such full and reasonable indemnity as to all costs, charges, and expenses incurred in and about any action, suit, or other legal proceeding, as shall be taxed by the proper officer in that behalf, subject to be reviewed in like manner and by the same authority as any other taxation of costs by such officer."

Byles, Serjt., moved for a rule calling upon the defendants to show cause why the master's taxation should not be reviewed. The 11 G. 2, c. 19, s. 22, (a) does *not apply to a rent-charge, but only to rent-service, as between landlord and tenant. In *The Leominster Canal Company v. Cowell*, EYRE, C. J., says: "The distress intended to be protected by the 11 G. 2, c. 19, is, a distress for a certain rent directly reserved by a landlord on his grant or demise of land theretofore made. In that case the landlord may avow generally, and is entitled to double costs. But this is a distress for rent by the canal act, (b) charged on the rates: it is a mere rent-charge, with a power of distress given; and not at all like the case of rent reserved by tenure. A rent-charge is not within the 11 G. 2." The like was held in *The Leominster Canal Company v. Norris*. So, in *Bulpit v. Clarke*, 1 N. R. 56, this court held that the 11 G. 2, c. 19, s. 22, does not extend to an avowry for a rent-charge. *Lindon v. Collins*, Willes, 429, is to the same effect. And in *Loyd v. Winton*, 2 Wilson, 28, it was held that an avowry for *heriot-custom* is not within the statute, though an avowry for *heriot-service* is. [MAULE, J. The words of the statute clearly do not apply.] The statute relied on as entitling the defendants to double costs, is, the 6 & 7 W. 4, c. 71, s. 81, which enacts, "that, in case the said rent-charge shall at any time be in arrear and unpaid for the space of twenty-one days next after any half-yearly day of payment, it shall be lawful for the *person entitled to the same, after having given or left ten days' [*563 notice in writing, at the usual or last known residence of the tenant in possession, to distrain upon the lands liable to the payment thereof, or on any part thereof, for all arrears of the said rent-charge, and to dispose of the distress when taken, and otherwise to act and demean himself in relation thereto, as any landlord may for arrears of rent reserved on a common lease for years; provided that not more than two years' arrears shall at any time be recoverable by distress." In a case which occurred before Mr. Justice COLTMAN some time since, (b) the owner of a tithe-rent-charge had distrained growing crops, relying upon the 11 G. 2, c. 19, s. 8, which authorizes growing crops to be distrained

(a) Which recites, "that great difficulties often arise in making avowries or conuances upon distresses for rent, quit-rents, reliefs, heriots, and other services," and enacts, "that, from and after the 24th of June, 1738, it shall and may be lawful to and for all defendants in replevin to avow or make conuance generally, that the plaintiff in replevin, or other tenant of the lands and tenements whereon such distress was made, enjoyed the same under a grant or demise at such a certain rent, during the time wherein the rent distrained for incurred, which rent was then and still remains due; or that the place where the distress was taken, was parcel of such certain tenements held of such honor, lordship, or manor, for which tenements the rent, relief, heriot, or other service distrained for was, at the time of such distress, and still remains, due,—without further setting forth the grant, tenure, demise, or title of such landlord or landlords, lessor or lessors, owner or owners of such manor; any law or usage to the contrary notwithstanding: and, if the plaintiff or plaintiffs in such action shall become nonsuit, discontinue his, her, or their action, or have judgment given against him, her, or them, the defendant or defendants in such replevin shall recover double costs of suit."

(b) 31 G. 3, c. lxix.

(c) Not reported.

for *rent-service*; but it was answered, that the 6 & 7 W. 4, c. 71, s. 81, does not say that the owner of a rent-charge under that act, may distrain what a landlord might lawfully distrain, but only, that, *having* lawfully taken a distress, he may dispose thereof, and otherwise act and demean himself in relation thereto, as any landlord may, for arrears of rent reserved on a common lease for years.

A rule nisi having been granted,

Atherton now showed cause. If all the benefits of the statute 11 G. 2, c. 19, are to attach in a case of this sort, one of them, of course, is, the right "to a full and reasonable indemnity as to costs." The decisions in *The Leominster Canal Company v. Norris*, and *The Leominster Canal Company v. Cowell*, turned upon the particular language of the local act. The short report of *Lindon v. Collins* gives no reasons for the decision. [MAULE, J. *Loyd v. Winton* is a clear authority that *564] *a rent-charge is not within the 11 G. 2, c. 19, s. 22.* Some meaning must be attached to the words of the 6 & 7 W. 4, c. 71, s. 81, by which it is provided that the owner of the tithe-rent-charge may "act and demean himself in relation to the distress, as any landlord may for arrears of rent reserved on a common lease for years." [WILDE, C. J. He may conduct the distress, when taken, as a landlord may. MAULE, J. He may impound the distress upon the premises; and he may sell, as the landlord may.] The fair meaning of the language is, that he shall have all the rights which the landlord has, and, incidentally, the right to double costs.

WILDE, C. J. I see no reasonable ground for doubt that the words of the statute 6 & 7 W. 4, c. 71, s. 81, are abundantly satisfied by holding that the owner of the tithe-rent-charge is to be allowed, on distraining for it, all the privileges which are conferred upon landlords by the 11 G. 2, c. 19, in cases of distress for rent in arrear. That does not include a right to double costs in the action of replevin. Costs result from no act of the party, but from the adjudication of the court. The 11 G. 2, c. 19, was passed for the benefit of landlords of a certain class, and not of owners of rents-charge. The cases cited, and particularly that of *Lindon v. Collins*, seem to me to be quite decisive; for, though the note of this latter case in the text of Willes, does not show how the case was determined, it appears(a) from Mr. Justice ABNEY's MS. that the rule calling on the prothonotary to review his taxation of (single) costs, was afterwards discharged: "the court being of opinion, that, though this statute was in some clauses remedial, in others it was penal: and that the clause in question, s. 22, which was a substantive clause, did not, in terms, *include rents-charge, and that, as it was a penal clause, it *565] ought not to be extended by construction."

MAULE, J. This clearly is not a case for double costs. The owner of the rent-charge, in distraining for it, may act and demean himself in

(a) Willes, 429 (b).

relation to the distress, as any landlord may for arrears of rent reserved on a common lease for years; that is, he may, without becoming a trespasser *ab initio*, conduct himself in a manner not strictly conformable with the proper mode of managing a distress.

V. WILLIAMS, J., and TALFOURD, J., concurred. Rule absolute.

THOMAS SMITH *v.* WILLIAM PRITCHARD, ROBERT BEAVER, WILLIAM TARN PRITCHARD, and DAVID JONES.
Nov. 21.

Where a warrant issues upon a judgment of a county-court against a party resident within another jurisdiction, and is sealed by the clerk of the court there, under the 104th section of the 9 & 10 Vict. c. 95, the high-bailiff of the court out of which the warrant originally issued, is not responsible for any irregularities in its execution by the under-bailiff of the foreign jurisdiction, even though his own under-bailiff assists therein.

Under a warrant so issued by one court, and sealed by the clerk of another court, the officers broke and entered the premises of a third person, under a mistaken impression that the party against whom the warrant was directed, was there; and, upon the owner of the premises resisting their entry, the bailiffs, under colour of the 114th section of the statute, took him into custody, and carried him before a magistrate:—

Held, that the high-bailiff of the court from which the warrant was *re-issued*, was liable with the under-bailiffs for the breaking and entering, which was an act done by the latter under the supposed authority of the writ; but not for the assault, which was committed in the assertion of a power given by the statute to the individual officer obstructed.

THIS was an action of trespass. The first count of the declaration stated that the defendants, on the 11th January, 1848, and on divers other days and *times between that day and the commencement of this suit, with force and arms broke and entered a certain factory, and [*566 a certain factory-yard thereto belonging, of the plaintiff, situate, &c., and called and known as *The Fountain Mills*, and then made a great noise and disturbance therein, and continued therein making such noise and disturbance for a long time, to wit, for the space of six hours, and then forced and broke open, broke to pieces, and damaged divers, to wit, ten windows of the plaintiff of and belonging to the said factory and premises, and broke to pieces, damaged, and spoiled divers, to wit, fifty panes of glass, and fifty iron bars, of and belonging to the said windows respectively, and of great value, to wit, 10*l.*, and then cast and threw about the goods and chattels, to wit, fifty bales of wool, of the plaintiff, and also then and there pulled down, prostrated, and destroyed, and tore away, severed, detached, and removed certain paling and fences of the plaintiff of and belonging to the said factory and factory-yard of the plaintiff: By means of which several premises, the plaintiff and his servants and workmen were, during all the time aforesaid, not only greatly disturbed and annoyed in the peaceable possession of the said factory and premises, but the plaintiff was, during all that time, hindered

and prevented from carrying on and transacting therein his lawful and necessary affairs and business.

The second count stated that the defendants, on, &c., with force and arms assaulted the plaintiff, and then seized and laid hold of and beat the plaintiff, and with great force and violence pulled and dragged him about, and then forced and compelled the plaintiff to go, and caused him to be forcibly conveyed, in custody, in and along divers public streets and highways, to a certain police-station, and there imprisoned the plaintiff, and kept and detained him in prison there, without any reasonable *567] or probable cause whatsoever, for a long *space of time, to wit, three hours, at the expiration whereof the defendants forced the plaintiff to go, and caused him to be forcibly conveyed, in custody, to a certain police-office, and there again imprisoned the plaintiff for a long time, to wit, two hours, and there also then took him the plaintiff before a certain police-magistrate, and there again imprisoned the plaintiff for a long time, to wit, two hours, contrary to law, and under a false and unreasonable assertion, colour, and charge that the plaintiff had committed an offence punishable by law, to wit, a misdemeanor; whereby the plaintiff was then not only greatly injured, and suffered great anguish and pain of mind and body, and was prevented from attending to his lawful affairs, but was also thereby then greatly exposed and injured in his credit, reputation, and circumstances, and was subjected to and put to divers expenses, to wit, to the amount of 5*l.*, in order to obtain his liberation from the said imprisonment; and other wrongs, &c.

The defendants pleaded,—first, not guilty,—secondly, as to the alleged trespasses in the first count mentioned, except as to casting and throwing about the goods and chattels of the plaintiff in that count mentioned, that, at the said times when, &c., and at each and every of them, the said factory and factory-yard and premises in the said first count mentioned, were not, nor was any or either of them, the factory, factory-yard, or premises of the plaintiff, in manner and form, &c.

Thirdly,—as to the said alleged trespasses in the first count mentioned, so far as relates to the breaking and entering the said factory and factory-yard thereto belonging, of the plaintiff, in that count mentioned, and making a noise and disturbance therein, and continuing therein making such noise and disturbance for the said space of time in that count in that behalf mentioned, and then and there pulling down, *568] prostrating, *destroying, tearing away, and removing the said paling and fences of the plaintiff in the said first count mentioned,—the defendant William Pritchard said, that, theretofore and before the commencement of this suit, and before the committing of the said alleged grievances in the said count mentioned, to wit, on the 23d of August, 1847, one Thomas Smith the younger levied his plaint in the Lambeth County-Court of Surrey, the same being a court constituted and holden under and by virtue of a certain act of parliament made and passed in

the session of parliament held in the 9th and 10th years of the reign of Her Majesty Queen Victoria, intituled "An act for the more easy recovery of small debts and demands in England," at the court-house of the said court at Denmark-Hill, in the parish of Camberwell, in the said county of Surrey, within the jurisdiction of the said court, against one Benjamin Trump, for a certain cause of action wherein the said court had jurisdiction; that thereupon, to wit, afterwards, on the day and year last aforesaid, the said B. Trump was duly summoned to appear at the said county-court at Denmark-Hill aforesaid, in the parish and county aforesaid, on the 22d of September, 1847, to answer the said Thomas Smith the younger in the matter of the said plaint; that thereupon, afterwards, to wit, on the day and year last aforesaid, the said B. Trump duly appeared in the said court, at the day and place appointed, to answer the said Thomas Smith the younger in the matter of the said plaint; that thereupon such proceedings were then and there had in the matter of the said plaint, that afterwards, on the 22d of September, 1847, at the court then holden at Denmark-Hill aforesaid, in the parish and county aforesaid, within the jurisdiction of the said court, before George Chilton, Esq., who then, and thence continually and at the time of the issuing of the warrant of commitment thereafter mentioned, was the judge of the said court, it was by the *consideration and judgment of the said court adjudged that judgment in the matter of the said plaint and action should pass [*569 against the said Thomas Smith the younger, and that the said Thomas Smith the younger should pay the sum of 2*l.* 11*s.* to the said B. Trump for his costs and charges by him about his suit in that behalf expended; and thereupon it was then and there ordered by the said court, that the said T. Smith the younger should so pay the said sum of 2*l.* 11*s.* forthwith,—as by the said record and proceedings thereof remaining in the said court fully appears: that the said T. Smith the younger did not pay the said sum of 2*l.* 11*s.* pursuant to the order, or at any time: that thereupon, afterwards, and after a reasonable time for the payment by the said T. Smith the younger of the said sum of 2*l.* 11*s.*, pursuant to the said order, had elapsed, to wit, on the 1st of October, 1847, and upon the application of the said B. Trump, a summons was then and there duly issued, according to the practice of the said court, against the said T. Smith the younger, by which last-mentioned summons the said T. Smith the younger was required to appear at the said county-court, to be holden at Denmark-Hill aforesaid, in the parish and county aforesaid, on, &c., at the hour, &c., to be then and there examined touching his estate and effects, and as to the property and means he still had of discharging the said costs, and as to the disposal he might have made of any property; and notice was thereby given to the said T. Smith the younger, that, if he did not appear, in obedience to the said summons, he might be committed to the common gaol of the said county: that it was duly proved, upon oath, to the said court, at the court holden on the

7th of December, 1847, that the said T. Smith the younger was personally served with the said summons, and the said T. Smith the younger did not attend at the said court, pursuant to the said summons, *570] *by reason of his illness; and thereupon it was then and there ordered by the said court, that the hearing of the said cause and matters should be adjourned to the 21st of December, 1847, at the court, &c.; and it was duly proved, upon oath, to the said court, at the court holden, &c., on the 21st of December, 1847, that due notice of the said adjournment had been given to the said T. Smith the younger; and the said T. Smith the younger did not attend the said court on the last-mentioned day, as required by the last-mentioned summons, and adjournment thereof, or allege any sufficient excuse for not so attending: that, thereupon, it was then and there ordered by the said judge, that the said T. Smith the younger should be committed for the term of twenty days to the county gaol of Surrey, in the said county, according to the form of the statute in that case made and provided, or until he should be discharged in due course of law: that thereupon one Charles Twamley, then being the clerk of the said court, afterwards, to wit, on the 21st of December, 1847, duly issued, under the seal of the said court, a warrant of commitment directed to the defendant William Tarn Pritchard, who then, and from thence until and at the said times when, &c., was the high-bailiff of the said court, as such high-bailiff, and to the other bailiffs of the said court, and all constables and peace officers within the jurisdiction of the said court, and to the governor of the county gaol of Surrey, commonly called Horsemonger-Lane Gaol,—which said warrant did empower and require the said high-bailiff, bailiffs, and others, to take the said T. Smith the younger, and to deliver him to the governor of the said gaol at the county gaol of Surrey aforesaid, and did empower and require the said governor to receive the said T. Smith the younger, and him safely to keep in the said gaol for the term of twenty days *571] from the arrest under the said warrant, or until he should be *sooner discharged by due course of law: that the said T. Smith the younger, afterwards, to wit, on the 8th of January, 1848, was not within the jurisdiction of the said court, but was out of the jurisdiction of the said court, and was believed to be, and was, within the jurisdiction of the Southwark County Court of Surrey, being also a court constituted and holden under and by virtue of the said act of parliament: that, thereupon, to wit, on the day and year last aforesaid, the defendant William Tarn Pritchard, as such high bailiff of the said Lambeth County-Court as aforesaid, did send the said warrant of commitment to John George Meymott and George Charles Fletcher, who then were, and thence hitherto continually until and at the said times when, &c., were, the joint-clerks of the said Southwark County-Court of Surrey, within the jurisdiction of which court the said T. Smith the younger was believed to be, and was, together with a certain warrant thereto annexed, under

the hand of the defendant William Tarn Pritchard, as such high-bailiff as aforesaid, and under the seal of the said Lambeth County-Court, from which the said original warrant of commitment issued, requiring execution of the said warrant of commitment against the said T. Smith the younger, wherever he should be found within the jurisdiction of the said Southwark County-Court: that the said John George Meymott and George Charles Fletcher, as such joint-clerks of the said Southwark County-Court, did thereupon, afterwards, to wit, on the 11th of January, 1848, within the jurisdiction of the said Southwark County-Court, seal the said warrant of commitment with the seal of the said Southwark County-Court, and then and there issued the same to the defendant William Pritchard, who then was, and thence until and at the said times when, &c., was, the high-bailiff of the said Southwark County-Court; and *thereupon the said last-mentioned high-bailiff became and [*572 was authorized and required to act in all respects as if the said original warrant of commitment had been directed to him by the court of which he was so the high-bailiff as aforesaid: * that, before and at the said times when, &c., and on the said 11th of January, 1848, in the first count mentioned, the said T. Smith the younger resided, and continued to reside, and was, in the said factory of the plaintiff in the said first count mentioned,—the same being within the jurisdiction of the said Southwark County-Court; and, on the day and year last aforesaid, was in the said factory, and near to and at a certain open window of the said factory, so that the said defendant William Pritchard could touch and take hold of the said T. Smith the younger, by passing his arm through the said open window: that, thereupon, under and by virtue of the said warrant of commitment, and whilst the same was in full force, and unreturned, the said William Pritchard, as such high-bailiff of the said Southwark County-Court as aforesaid, then holding the said warrant of commitment, did, on the day and year last aforesaid, within the jurisdiction of the said Southwark County-Court, and whilst the said T. Smith the younger was residing and was in the said factory, and was at and near the said open window thereof, pass his arm through the said open window, in order to, and did then and thereby, take hold of and arrest the said T. Smith the younger, and the said T. Smith the younger then forcibly, and against the will of the said defendant William Pritchard, broke away and escaped from the said defendant, and then took refuge and remained in the said factory of the plaintiff in the first count mentioned: that, thereupon, the said defendant William Pritchard, then having reasonable cause to believe, and then believing, that the said T. Smith the younger was then within the said *factory, and having first demanded and requested the plaintiff [*573 to permit the said defendant William Pritchard to enter the said factory-yard and factory, in order to search for, take again, re-seize, and arrest, under the said warrant of commitment, the said T. Smith the

younger,—which the plaintiff then wholly neglected and refused to do, but obstructed and hindered the said defendant from entering into the said factory-yard or factory, for the purpose aforesaid,—and because the gates of the said factory-yard were then closed and fastened, and could not be opened by the said defendant William Pritchard, did break and enter the said factory-yard of the plaintiff in the said first count mentioned, and, in so doing, and because the said defendant could not otherwise enter into the said factory-yard, he the said defendant William Pritchard did necessarily and unavoidably a little pull down, prostrate, and destroy, tear away, sever, detach, and remove the said palings and fences of the plaintiff, doing no unnecessary damage to the plaintiff; and did then enter peaceably and quietly into the said factory of the plaintiff, the outer door thereof being then open, in order to search for, take again, re-seize, and arrest the said T. Smith the younger, and, in so doing, the said defendant William Pritchard, as such high-bailiff as aforesaid, did then necessarily and unavoidably make a little noise and disturbance in the said factory, and did continue therein making such noise and disturbance, for the said space of time in the said first count in that behalf mentioned, being a reasonable time to continue therein for the purpose aforesaid, as he lawfully might for the causes aforesaid; doing no unnecessary damage on the occasions aforesaid, which were the said alleged trespasses in the introductory part of the said plea mentioned.

Fourthly,—a similar plea to the last, by the defendants Robert Beaver *574] and David Jones, down to the *asterisk at p. 572, line 4; then as follows:—That, before and at the time of the issuing of the said warrant of commitment as aforesaid, and thence continually until and at the said times when, &c., the defendant Robert Beaver was a bailiff of the said Southwark County-Court, having been theretofore, to wit, on the day and year last aforesaid, by a certain writing under the hand of the said defendant William Pritchard by him duly appointed to be such bailiff to assist him the said William Pritchard in the execution of his said office; and thereupon, afterwards, to wit, on, &c., last aforesaid, and before the said times when, &c., the said defendant William Pritchard, as such high-bailiff of the said Southwark County-Court, delivered the said warrant of commitment, so sealed as aforesaid, to the said Robert Beaver, so being such bailiff of the last-mentioned court as aforesaid, to be by him executed in due form of law: that, before and at the said times when, &c., and on the said 11th of January, 1848, in the said first count mentioned, the said T. Smith the younger resided, and continued to reside, and was, in the said factory of the plaintiff in the said first count mentioned, the same being within the jurisdiction of the said Southwark County-Court, and, on the day and year last aforesaid, was in the said factory, near to and at a certain open window of the said factory, so that the said defendants could touch and take hold of the said T. Smith the younger, by passing their arms through the said open

window ; whereupon, and under and by virtue of the said several premises, and of the said warrant of commitment, and whilst the same was in full force and unreturned, the defendant Robert Beaver, as such bailiff of the said Southwark County-Court, and then holding the said warrant of commitment, and the said David Jones, as his servant, and by his command, did, on the day and year last aforesaid, within the jurisdiction of *the said Southwark County-Court, and whilst the said T. Smith the younger was residing, and was, in the said factory, and was at and near to the said open window thereof, pass their arms through the said open window, in order to, and did then and there, thereby take hold of and arrest the said T. Smith the younger, and the said T. Smith the younger then forcibly, and against the will of the said defendants, broke away and escaped from the said defendants, and then took refuge and remained in the said factory of the plaintiff in the said first count mentioned : that thereupon, the defendants, then having reasonable cause to believe, and then believing, that the said T. Smith the younger was then within the said factory, and having first demanded and requested the plaintiff to permit the said defendants to enter the said factory-yard and factory, in order to search for, take again, re-seize, and arrest, under the said warrant of commitment, the said T. Smith the younger,—which the plaintiff then wholly neglected and refused to do, but obstructed and hindered the said defendants from entering into the said factory-yard or factory, for the purpose aforesaid,—and because the gates of the said factory-yard were then closed and fastened, and could not be opened by the said defendants, did break and enter the said factory-yard of the plaintiff in the said first count mentioned, and, in so doing, and because the said defendants could not then otherwise enter into the said factory-yard, they the said defendants did necessarily and unavoidably a little pull down, prostrate, and destroy, tear away, detach, and remove the said palings and fences of the plaintiff in the first count mentioned, doing no unnecessary damage to the plaintiff, and did then enter peaceably and quietly into the said factory of the plaintiff, the outer door thereof then being open, in order to search for, take again, re-seize, and arrest the *said T. Smith the younger, under and by virtue of the said warrant of commitment ; and in so doing, the said defendants Robert Beaver, as such bailiff as aforesaid, and David Jones, as his servant as aforesaid, did necessarily and unavoidably make a little noise, &c., &c. [*576]

Fifthly,—as to the alleged trespasses in the second count of the declaration mentioned, so far as related to assaulting the plaintiff, and then seizing and laying hold of the plaintiff, and a little pulling and dragging him about, and then forcing and compelling the plaintiff to go, and causing him to be conveyed, in custody, in and along divers public streets and highways, to a certain police-station, and there imprisoning the plaintiff, and keeping and detaining him there for the space of time in the said second count of the declaration in that behalf mentioned, and

younger,—which the plaintiff then wholly neglected and refused to do, but obstructed and hindered the said defendant from entering into the said factory-yard or factory, for the purpose aforesaid,—and because the gates of the said factory-yard were then closed and fastened, and could not be opened by the said defendant William Pritchard, did break and enter the said factory-yard of the plaintiff in the said first count mentioned, and, in so doing, and because the said defendant could not otherwise enter into the said factory-yard, he the said defendant William Pritchard did necessarily and unavoidably a little pull down, prostrate, and destroy, tear away, sever, detach, and remove the said palings and fences of the plaintiff, doing no unnecessary damage to the plaintiff; and did then enter peaceably and quietly into the said factory of the plaintiff, the outer door thereof being then open, in order to search for, take again, re-seize, and arrest the said T. Smith the younger, and, in so doing, the said defendant William Pritchard, as such high-bailiff as aforesaid, did then necessarily and unavoidably make a little noise and disturbance in the said factory, and did continue therein making such noise and disturbance, for the said space of time in the said first count in that behalf mentioned, being a reasonable time to continue therein for the purpose aforesaid, as he lawfully might for the causes aforesaid; doing no unnecessary damage on the occasions aforesaid, which were the said alleged trespasses in the introductory part of the said plea mentioned.

Fourthly,—a similar plea to the last, by the defendants Robert Beaver *574] and David Jones, down to the *asterisk at p. 572, line 4; then as follows:—That, before and at the time of the issuing of the said warrant of commitment as aforesaid, and thence continually until and at the said times when, &c., the defendant Robert Beaver was a bailiff of the said Southwark County-Court, having been theretofore, to wit, on the day and year last aforesaid, by a certain writing under the hand of the said defendant William Pritchard by him duly appointed to be such bailiff to assist him the said William Pritchard in the execution of his said office; and thereupon, afterwards, to wit, on, &c., last aforesaid, and before the said times when, &c., the said defendant William Pritchard, as such high-bailiff of the said Southwark County-Court, delivered the said warrant of commitment, so sealed as aforesaid, to the said Robert Beaver, so being such bailiff of the last-mentioned court as aforesaid, to be by him executed in due form of law: that, before and at the said times when, &c., and on the said 11th of January, 1848, in the said first count mentioned, the said T. Smith the younger resided, and continued to reside, and was, in the said factory of the plaintiff in the said first count mentioned, the same being within the jurisdiction of the said Southwark County-Court, and, on the day and year last aforesaid, was in the said factory, near to and at a certain open window of the said factory, so that the said defendants could touch and take hold of the said T. Smith the younger, by passing their arms through the said open

window; whereupon, and under and by virtue of the said several premises, and of the said warrant of commitment, and whilst the same was in full force and unreturned, the defendant Robert Beaver, as such bailiff of the said Southwark County-Court, and then holding the said warrant of commitment, and the said David Jones, as his servant, and by his command, did, on the day and year last aforesaid, within the jurisdiction of *the said Southwark County-Court, and whilst the said T. Smith [*575 the younger was residing, and was, in the said factory, and was at and near to the said open window thereof, pass their arms through the said open window, in order to, and did then and there, thereby take hold of and arrest the said T. Smith the younger, and the said T. Smith the younger then forcibly, and against the will of the said defendants, broke away and escaped from the said defendants, and then took refuge and remained in the said factory of the plaintiff in the said first count mentioned: that thereupon, the defendants, then having reasonable cause to believe, and then believing, that the said T. Smith the younger was then within the said factory, and having first demanded and requested the plaintiff to permit the said defendants to enter the said factory-yard and factory, in order to search for, take again, re-seize, and arrest, under the said warrant of commitment, the said T. Smith the younger,—which the plaintiff then wholly neglected and refused to do, but obstructed and hindered the said defendants from entering into the said factory-yard or factory, for the purpose aforesaid,—and because the gates of the said factory-yard were then closed and fastened, and could not be opened by the said defendants, did break and enter the said factory-yard of the plaintiff in the said first count mentioned, and, in so doing, and because the said defendants could not then otherwise enter into the said factory-yard, they the said defendants did necessarily and unavoidably a little pull down, prostrate, and destroy, tear away, detach, and remove the said palings and fences of the plaintiff in the first count mentioned, doing no unnecessary damage to the plaintiff, and did then enter peaceably and quietly into the said factory of the plaintiff, the outer door thereof then being open, in order to search for, take again, re-seize, and arrest the *said [*576 T. Smith the younger, under and by virtue of the said warrant of commitment; and in so doing, the said defendants Robert Beaver, as such bailiff as aforesaid, and David Jones, as his servant as aforesaid, did necessarily and unavoidably make a little noise, &c., &c.

Fifthly,—as to the alleged trespasses in the second count of the declaration mentioned, so far as related to assaulting the plaintiff, and then seizing and laying hold of the plaintiff, and a little pulling and dragging him about, and then forcing and compelling the plaintiff to go, and causing him to be conveyed, in custody, in and along divers public streets and highways, to a certain police-station, and there imprisoning the plaintiff, and keeping and detaining him there for the space of time in the said second count of the declaration in that behalf mentioned, and

then forcing the plaintiff to go, and causing him to be conveyed, in custody, to a certain police-office, and there again imprisoning the plaintiff for the space of time in the said second count in that behalf mentioned, and then also taking the plaintiff before a certain police-magistrate, and there again imprisoning the plaintiff for the space of time in the said second count in that behalf mentioned,—the defendants Robert Beaver and David Jones said, that, after the issuing of the said warrant of commitment to the defendant William Tarn Pritchard, as in the said last plea mentioned, and before the sending of the same by him to the said clerks of the Southwark County-Court, as therein mentioned, and after the sealing and issuing of the same by them to the defendant William Pritchard, and after the delivery by the said William Pritchard of the said warrant of commitment, so sealed as in the said last plea mentioned, to the defendant Robert Beaver, as, and so being, such bailiff of the said Southwark County-Court, as in that plea mentioned, to be by him the said Robert Beaver executed in due form *577] of law, and whilst the said Robert Beaver held the said warrant of commitment, and whilst the same was in full force, and unreturned, and whilst the said defendant Robert Beaver, under and by virtue of the said several premises in the said last plea mentioned, and of the said warrant of commitment, and as such bailiff as in that plea mentioned, and whilst the said defendant David Jones, as the servant of the said Robert Beaver, and by his command, as in that plea mentioned and within the jurisdiction of the said Southwark County Court, were, in the execution of their duty as such bailiff and servant as aforesaid, arresting and endeavouring to arrest and detain the said T. Smith the younger, at the said open window of the said factory of the plaintiff, as in the said plea, to wit, on, &c., and within the Metropolitan-police district, he, the plaintiff, in order to prevent and hinder the said defendants from performing and executing their said duty, did, with force and arms, assault, beat, strike, and with an iron bar cruelly wound the said defendants Robert Beaver and David Jones : and that therefore they the said defendants Robert Beaver and David Jones, then, to wit, on, &c., last aforesaid, gently laid their hands on and assaulted the plaintiff, in order to take, and did then take the plaintiff into the custody of the said Robert Beaver ; and then, immediately afterwards, as soon as conveniently could be, forced and compelled the plaintiff to go, and caused him to be conveyed, in custody, in and along divers public streets and highways, being the nearest and most convenient in that behalf, to the said station-house in the said second count mentioned, the same being within the said Metropolitan-police district, and being the nearest and most convenient in that behalf, and then did imprison the plaintiff therein, upon the said charge, for the said space of time in that behalf in the said second count *mentioned, being a reasonable *578] time in that behalf, and, as soon as conveniently could be, forced the plaintiff to go, and caused him to be conveyed, in the said custody, to

the Southwark Police-Office, in Blackman Street, in the borough of Southwark, within the Metropolitan-police district, and then taken before J. C., Esq., one of the magistrates of the police-courts of the Metropolis, sitting at the said Southwark Police-Court, and having jurisdiction in the district in which the said offence was committed, to be examined by and before the said J. C., Esq., as, and so being, such magistrate as aforesaid, concerning the premises, and there imprisoned the plaintiff until the said J. C., Esq., could and did adjudicate on the premises, and no longer; and so the said defendants Robert Beaver and David Jones committed the said alleged trespasses in the introductory part of this plea mentioned.

The plaintiff joined issue on the first and second pleas.

To the third plea (of William Pritchard) the plaintiff replied, that, though true it is that the said plaint was levied by the said T. Smith the younger, in the said Lambeth County-Court, against the said B. Trump, and that judgment in the matter of the said plaint was adjudged to pass against the said T. Smith the younger; and that, although true it is that it was ordered by the said last-mentioned court, that the said T. Smith the younger should pay the said money, as in the said third plea alleged; and though true it is that a summons was then and there duly issued, according to the practice of the said court, against the said T. Smith the younger, and that the said summons was personally served upon the said T. Smith the younger, and that it was then and there, as in the said third plea alleged, ordered by the said judge of the said county-court of Lambeth that the said T. Smith the younger should be committed to *prison; and though true it is that a warrant of commitment directed to the said William Tarn Pritchard, as such high-bailiff [*579 of the said Lambeth County-Court, and to the other bailiffs of the said court, was duly issued under the seal of the said court; and though true it is that the said William Tarn Pritchard, as such high-bailiff as aforesaid, did send the said warrant of commitment to John George Meymott and George Charles Fletcher, the joint-clerks of the said Southwark County-Court, and that the said J. G. Meymott and G. C. Fletcher, as such clerks as aforesaid, within the jurisdiction and under the seal of the said last-mentioned court, did issue the said warrant of commitment to the said William Pritchard, who then and there was the high-bailiff of the said last-mentioned court; and though true it is that all such proceedings as in the said third plea alleged, were had, done, and performed in the said several county-courts respectively;—yet, for replication to that plea, the plaintiff said that the defendant William Pritchard, at the said times when, &c., of his own wrong, and without the residue of the cause in the said third plea alleged, committed the trespasses in the introductory part of the said third plea mentioned, in manner and form, &c.

There were similar replications to the fourth and fifth pleas, of Beaver and Jones.

Upon these replications issue was joined.

The cause was tried before V. WILLIAMS, J., at the sittings in Middlesex after Trinity term, 1848. The facts were as follows:—

The defendant William Pritchard was the high-bailiff of the Southwark County-Court: Beaver was his under-bailiff. The defendant William Tarn Pritchard was the high-bailiff of the Lambeth County-Court: and Jones was his under-bailiff.

*580] Thomas Smith the younger had levied a plaint in an *action of trespass in the Lambeth County-Court against one Trump, for an alleged illegal distress, and, being nonsuited, was ordered by that court to pay Trump 2*l.* 11*s.* for costs. A warrant issued out of the Lambeth County Court against T. Smith the younger for nonpayment of those costs, and was delivered by William Tarn Pritchard to Jones to be executed. T. Smith the younger, however, residing within the district of the Southwark County Court, it became necessary to obtain the assistance of William Pritchard, the high-bailiff of that district, in the manner pointed out by the 104th section of the county-court act, 9 & 10 Vict. c. 95.(a) Accord-
*581] ingly, the warrant from the Lambeth *County-Court was sent to the clerks of the Southwark County-Court, and by them sealed and delivered to William Pritchard, whose under-bailiff Beaver accompanied Jones to the factory of the plaintiff, who was the father of the party against whom the warrant was directed. The officers Beaver and Jones, believing that they saw T. Smith the younger through a window of the plaintiff's factory, forcibly entered therein for the purpose of apprehending him. The plaintiff resisted them; whereupon they retired, but afterwards returned, and took the plaintiff into custody, on a charge of having obstructed and assaulted them in the execution of their duty, and carried him before a police-magistrate.

The jury found that Thomas Smith the younger was not in the factory

(a) Which enacts, "that, in all cases where a warrant of execution shall have issued against the goods and chattels of any party, or an order for his commitment shall have been made under this act, and such party, or his goods and chattels, shall be out of the jurisdiction of the court, it shall be lawful for the high-bailiff of the court to send such warrant of execution or of commitment to the clerk of any other court constituted under this act, within the jurisdiction of which such party, or his goods and chattels, shall then be, or be believed to be; with a warrant thereto annexed, under the hand of the high-bailiff and seal of the court from which the original warrant issued, requiring execution of the same; and the clerk of the court to which the same shall be sent, shall seal or stamp the same with the seal of his court, and issue the same to the high-bailiff of his court; and thereupon such last-mentioned high-bailiff shall be authorized and required to act in all respects as if the original warrant of execution or commitment had been directed to him by the court of which he is the high-bailiff, and shall, within such time as shall be specified in the rules of practice, return to the high-bailiff of the court from which the same originally issued, what he shall have done in the execution of such process, and, in case a levy shall have been made, shall, within such time as shall be specified in the rules of practice, pay over all moneys received in pursuance of the warrant to the high-bailiff of the court from which the same shall have originally issued, retaining the fees for execution of the process: and, where any order of commitment shall have been made, and the person apprehended, he shall be forthwith conveyed, in custody of the bailiff or officer apprehending him, to the gaol or house of correction, or other prison of the court within the jurisdiction of which he shall have been apprehended, and kept therein for the time mentioned in the warrant of commitment, unless sooner discharged under the provisions of this act: and all constables and other peace officers shall be aiding and assisting within their respective districts, in the execution of such warrant."

at the time the officers attempted to break in for the purpose of taking him. And the learned judge thought that William Tarn Pritchard, the high-bailiff of the Lambeth County-Court, was not liable at all; but that William Pritchard, the high-bailiff of the Southwark County-Court, *was* liable for the breaking and entering charged in the first count, and the defendants Beaver and Jones for the trespasses charged in both counts.

A verdict was thereupon taken for the defendant William Tarn Pritchard, and for the plaintiff, as against William Pritchard, for 10*l.*, upon the first issue, so far as it related to the breaking and entering charged in the first count; and as against Beaver and Jones in respect of the trespasses in both counts, with 70*l.* damages,—being 10*l.* on the first count, and 60*l.* on the second count.

**Byles*, Serjt., in Michaelmas term last, on behalf of the plaintiff, pursuant to leave reserved to him at the trial, moved for a [*582 rule calling upon the defendants to show cause why the verdict found for William Tarn Pritchard should not be set aside, and a verdict entered for the plaintiff as against all the defendants, for 70*l.*, or for 10*l.*, as the court should direct. He referred to the 33d and 104th sections of the 9 & 10 Vict. c. 95, and to the case of *Smart v. Hutton*, 8 Ad. & E. 568, n., and submitted that both the high-bailiffs were responsible for what was done by the under-bailiffs under colour of the warrant. [WILDE, C. J. Jones was not acting under the orders of the high-bailiff of the Lambeth County-Court. He was acting out of his jurisdiction.] Where a bailiff goes out of his county, and arrests a man, the sheriff is liable. [WILDE, C. J. No authority was given by the high-bailiff of the Lambeth County-Court to his officer: his act was merely ministerial. MAULE, J. Jones acted as the assistant of the under-bailiff of the Southwark County-Court.] For a trespass committed under a backed warrant, the magistrate who originally issues the warrant is liable. [MAULE, J. The situation of sheriffs is peculiar. Here, you are seeking to make one liable for the acts of a person over whom he has no manner of control.]

WILDE, C. J. The rule will go as against the two under-bailiffs, and the high-bailiff of the Southwark County-Court only. We are all clearly of opinion that there is no ground whatever to charge the high-bailiff of the Lambeth County-Court. He acted ministerially only, under the statute. There was no privity between him and those who acted under the warrant from the Southwark County-Court.

**Humfrey* and *Hannen* showed cause. It is conceded that the plaintiff is entitled to a verdict against William Pritchard, Beaver, [*583 and Jones, for 10*l.*, upon the issue on not guilty to the first count: but the former is clearly not liable at all for the assault charged in the second count. *Smart v. Hutton* has no application. What was done there, was done under colour of the writ. Here, at the time of the alleged assault complained of in the second count, all connexion between the high-bailiff of the Southwark County-Court and the subordinate officers, had ceased.

The duties and liabilities of the high-bailiff are defined by the 38d section of the county-court act, which enacts, "that the said high-bailiffs, or one of them, shall attend every sitting of the court, for such time as shall be required by the judge, unless when their absence shall be allowed for reasonable cause by the judge; and shall, by themselves, or by the bailiffs appointed to assist them as aforesaid, serve all the summonses and orders, and execute all the warrants, precepts, and writs, issued out of the court: and the said high-bailiffs and bailiffs shall, in the execution of their duties, conform to all such general rules as shall be, from time to time, made for regulating the proceedings of the court, as hereinafter provided, and, subject thereunto, to the order and direction of the judge; and the said high-bailiffs shall be entitled to receive all fees and sums of money allowed by this act in the name of fees payable to the bailiff, out of which they shall provide for the execution of the duties for which such fees are allowed, and for the payment of the bailiffs and officers appointed to assist them, according to such scale of remuneration as shall be, from time to time, approved by the judge; and every such high-bailiff shall be responsible for all the acts and defaults of himself and of the bailiffs appointed to assist him, in like manner as the sheriff of any county in England is *responsible for the acts and defaults of himself and his officers." [MAULE, J. The question is, whether the officers were acting under colour of the warrant, at the time they took the plaintiff into custody. They undoubtedly thought they were acting as bailiffs. The 114th section(a) must, I think, be restrained to the bailiff assaulted. The principle of the sheriff's responsibility, is, that he selects the man to do the particular thing. Here, it may be said that the high-bailiff selects his subordinate officer as a person fit to be intrusted with the power to arrest a person who assaults him in the execution of his duty.] The liability of the high-bailiff for the acts of his subordinates, is expressly limited to that of the sheriff at common law. The power given under the 114th section is for the protection of the bailiff himself: what is done under that section, therefore, clearly cannot in any sense be said to be done under colour of the warrant. [MAULE, J. Suppose the officers were really assaulted while in the execution of their duty, and they thereupon arrested the plaintiff,—could you say that they were not acting by virtue of the warrant?] Certainly. [WILDE, C. J. The intention of the 114th section, no doubt, was, to prevent interruptions to the execution of process.] A party apprehended under this clause, may be fined and imprisoned by the magistrate. These persons were

(a) Which enacts, "that, if any officer or bailiff of any court holden under this act, shall be assaulted while in the execution of his duty, or if any rescue shall be made or attempted to be made of any goods levied under process of the court, the person so offending shall be liable to a fine not exceeding 5*l.*, to be recovered by order of the court, or before a justice of the peace as hereinafter provided; and it shall be lawful for the bailiff of the court, or any peace officer, in any such case, to take the offender into custody (with or without warrant), and bring him before such court of justice accordingly."

assuming to exercise a power which the law annexes to the warrant, but not to act under the authority of the *warrant. Their power [*585 was beside and independent of the warrant.

Byles, Serjt., and *Bovill*, in support of the rule. The defendant William Pritchard is equally liable with Beaver and Jones for the assault complained of in the second count. The 31st section of the statute gives the high-bailiff a discretion in the selection of his bailiffs: there is no hardship, therefore, in holding him responsible for acts done by them in the execution of their duty. If Thomas Smith the younger had been arrested at the time of the first entry, it clearly would have been an arrest by virtue of the warrant. In order to make the high-bailiff responsible, it is not necessary that the act of the under-bailiff should be an act done strictly under the warrant: it is enough if he thinks he is acting, and means to act, by virtue of the warrant. [MAULE, J. Is that quite so? The high-bailiff is not, I apprehend, responsible for everything the under-bailiff fancies or believes to be done in pursuance of his duty.] His responsibility is the same as that of the sheriff: and the sheriff is liable, though the officer mistakes; as, if under a warrant directing him to take A., he arrests B. [WILDE, C. J. Suppose the officer comes to the court for an attachment upon an unfounded charge of interruption in the execution of his duty,—would the sheriff be responsible for what might be done under that process? MAULE, J. The case of the sheriff is somewhat different: he directs the officer to take Smith, and the officer by mistake takes Brown. In this case, the bailiffs take the plaintiff, not under the order of any one, but under the *permission* of the act of parliament.] It is not by any means conceded that the under-bailiffs did not do what they did, by the order of the high-bailiff. The high-bailiff, when he appoints an under-bailiff, appoints him to do all that the act of parliament *enables him to do. [MAULE, J. [*586 The particular power in question clearly is one which the under-bailiff has the option of exercising or not, as he likes.] Assuming it to be discretionary, if he does it, he does it under colour of his office. In *Smart v. Hutton*, 8 Ad. & E. 568, n., it was held that the sheriff is civilly liable for misconduct of his officer in executing a writ, though the act done be contrary to the express terms of the writ; as, if he take the person under a *fi. fa.* PARKE, J., there says: "The sheriff is liable for whatever the bailiff does under colour of the writ. The officer is delegated by him to execute the writ; and the officer's acts are his: it is as if the sheriff himself delivered the party to the gaoler's custody." So, in *Ackworth v. Kempe*, 1 Dougl. 40, it was held, that, if on a *fi. fa.* against A., a bailiff takes the goods of B., trespass lies against the sheriff. And Lord MANSFIELD said: "For all civil purposes, the act of the sheriff's bailiff, is the act of the sheriff." And in *Parrot v. Mumford*, 2 Esp. N. P. C. 585, it was held that an action for false imprisonment lies against the sheriff for an arrest made by the bailiff after the

return-day of the writ. [MAULE, J. That is not contested.] The high-bailiff is responsible for his bailiff's excess of duty whether by negligence or otherwise. [MAULE, J. In all these cases, there must be a misfeasance of something which the subordinate officer has been ordered to do.] Or which he was bound to do.

At all events, if the high-bailiff is not responsible for the assault, the plaintiff may have a verdict on the first count against the three, and a verdict for 60*l.* on the second count against Beaver and Jones. In Tidd's Practice,(a) it is said: "In trespass against several defendants who join *587] in pleading, if the jury, on the trial, *find them all jointly guilty, they cannot assess several damages.(b) But they may find some of them guilty, and acquit others; in which case, the damages can be assessed against those only who are found guilty: or they may find some of the defendants guilty of the whole trespass, and others of a part only;(c) or some of them guilty of part, or at one time, and the rest guilty of other part, or at another time:(d) in either of which cases, they may assess several damages." And the rule is similarly laid down in Archbold's Practice.(e) [TALFOURD, J. The answer to that is the answer given by TINDAL, C. J., in *Eliot v. Allen*, 1 Man. Gr. & S. 18, 31.] In *Eliot v. Allen*, all the defendants were charged with the commission of one offence; and the jury found all guilty of the same acts of trespass. [MAULE, J. The whole court is of opinion that this point does not properly arise. What was agreed upon at the trial, was, that the jury should assess the damages separately, leaving the court to apply them as they might think fit.] What, then, becomes of the 60*l.* damages on the second count? [V. WILLIAMS, J. The plaintiff will have his option,—to take a verdict against the three defendants William Pritchard, Beaver, and Jones, on the first count, with 10*l.* damages,—or against Beaver and Jones, upon both counts, for 70*l.*,—or this rule will be discharged, with costs.]

MAULE, J.(g) I think the liability of the high-bailiff is not of a *588] character so extensive as my brother **Byles* has contended for. He is, by the 33d section of the 9 & 10 Vict. c. 95, placed in the same situation with regard to his under-bailiffs, as the sheriff is placed in, by the ordinary law, with respect to the bailiffs who execute *his* warrants. Cases might arise in which the high-bailiff of a county-court might incur a liability exceeding the liability incurred by the sheriff: but it is not suggested that the present is a case of that kind; it is conceded, that his liability under s. 33 is co-extensive with that of the sheriff for

(a) 9th edit. Vol. II. p. 896.

(b) Citing Cro. Elis. 860; 11 Co. Rep. 5; 1 Stra. 422; 2 Stra. 910; 5 Burr. 2792; 6 T. R. 199.

(c) Citing Cro. Elis. 860; 11 Co. Rep. 5; Sty. Rep. 5.

(d) Citing 11 Co. Rep. 1; Brownl. 233; Cro. Car. 54.

(e) 10th edit., by Chitty, Vol. I. p. 449.

(g) WILDE, C. J., had left the court, but desired MAULE, J., to say that he concurred in the judgment about to be pronounced.

the acts of his officers. Now, the liability of the sheriff in case of mistake or misconduct on the part of his officer, though extensive, is confined to cases where there is a misdoing of something which the sheriff commands him to do. If the sheriff is sued for a misfeasance of the officer, it is no answer for him to say that his command was not obeyed: he is still liable, provided the thing done be something which by the command or under the authority of the sheriff the officer was bound to do. For the reasons thrown out in the course of the argument, I think the power of arrest given to the officers by s. 114, is permissive and optional only, and not mandatory. The act for which it is here sought to make the high-bailiff responsible is one which, placing it at the highest, he *authorized*, but did not command, the under-bailiff to do. It may be that it was not even an authority given by the high-bailiff, but a power conferred by the act upon a person whom the high-bailiff has thought fit to intrust with the execution of the process of the court,—to which latter opinion the lord chief justice inclines. In either view, it would be extending the liability of the high-bailiff beyond what any decided case has imposed upon the sheriff, to hold that it attaches in a case like the present. The reason that the sheriff is held liable, is, that, having a duty imposed upon him by law, instead of performing it himself, he *delegates it to another; and therefore it is but just that he [589 should be responsible for the misconduct of those to whom he so delegates the performance of his duty. For these reasons, I think the law does not impose upon the high-bailiff a liability to the extent which has been contended for. I therefore think the rule should be made absolute,—to enter the verdict for the plaintiff against the defendants William Pritchard, Beaver, and Jones upon the issue on not guilty as to the first count, with 10*l.* damages, and discharged as to the rest.

V. WILLIAMS, J. I am of the same opinion. I think the case was very justly and forcibly presented by Mr. *Hannen*, who said, that, if the bailiff had been called upon to show the authority which justified him in taking the plaintiff to the police-station, he could only have referred to the authority of the 114th section of the act, and not to the warrant, except as giving rise to the exercise of the authority given by that section. That is putting it upon the true ground. I therefore think that the high-bailiff is not to be held responsible for an act so done under colour of the act of parliament, and not of the warrant.

There can only be a joint verdict in trespass in respect of a joint trespass by all the defendants. I thought at the trial, and I still think, that the three defendants, William Pritchard, Beaver, and Jones, were jointly liable for the trespasses charged in the first count; but that the two latter only were guilty of the trespasses charged in the second count. There ought, therefore, to be a verdict against the three, with 10*l.* damages, upon the issue on not guilty as to the first count, and a verdict for all the defendants as to the second count; or the plaintiff should

*590] have a verdict against Beaver and Jones on both counts, *with 70*l.* damages; or the rule will be discharged, with costs.

TALFOURD, J., concurred.

Humfrey, for the defendants, submitted, that, inasmuch as they did not, at the trial, resist a verdict against them upon not guilty to the first count, they ought not to pay, but, on the contrary, should receive, costs on this motion.

Bovill, contra. The defendants should have given the plaintiff notice that they would not oppose the rule to the extent now suggested, and then there might have been some ground for this application.

Humfrey. We could not consent in that way to the rule being made absolute as to part.

TALFOURD, J. Why not? If you had come into court when the rule was granted, and made the proposal now made, you would have had some ground for what you ask. Not so now.

MAULE, J. It was competent to you, although you signified that assent at the trial, to insist, upon the argument on the rule, that the rule ought to be discharged *in toto*.

Humfrey. At all events, the defendants ought not to *pay* the costs of this rule.

MAULE, J. It often happens that a party gets less than he asks by his rule. But it is a very rare thing for the court to make a special order about costs.

*591] *V. WILLIAMS, J. If I had acted upon my present impression at the trial, I should have directed the verdict to be entered as now proposed. It was put in the way it was, for the purpose of giving the plaintiff the option of coming to the court.

MAULE, J. The only matter in controversy at or since the trial, was, whether the high-bailiff of the Lambeth County-Court was liable to the extent of the 70*l.* In that the plaintiff has failed. We therefore think he ought not to have the costs of this rule.

Rule absolute, to enter a verdict for the plaintiff on the first issue as to the first count, against the defendants William Pritchard, Beaver, and Jones, with 10*l.* damages; and to enter a verdict on the first issue so far as relates to the second count, for those defendants;—neither party to be entitled to any costs of and occasioned by the rule.

***DAVID FITZGERALD v. CHARLES FITZGERALD.**

Nov. 21.

[*592]

Marriage does not enure as an assignment to the husband of a judgment recovered by the wife, in Ireland, before the marriage, under the 9 G. 2, c. 5 (Irish), amended by the 25 G. 2, c. 14 (Irish), and made perpetual by the 12 G. 3, c. 19, s. 3. Under these statutes, an examined copy of the enrolment of the memorial of an assignment of such judgment, is good evidence of that assignment.

THIS was an action of debt, by the plaintiff, as assignee of an Irish judgment entered up on a warrant of attorney.

The declaration began by setting out the 9 G. 2, c. 5, the 25 G. 2, c. 14, amending the former act, the 12 G. 3, c. 19, making the 9 G. 2, c. 5, as amended, perpetual, and the Act of Union, passed in the 40 G. 3 (c. 38), by the Irish parliament; and then alleged, that, in 1830, the defendant, by his writing obligatory, acknowledged himself to be bound to Alicia Fitzgerald in the sum of 219*l.* 9*s.* 2½*d.*, conditioned to pay 109*l.* 14*s.* 7*d.*, with lawful interest, on the 12th of January, 1831, and, that, for securing payment of the bond, the defendant, on the same day and year, executed a warrant of attorney to confess judgment at the suit of Alicia Fitzgerald, and that, in the 11 G. 4, Alicia Fitzgerald impleaded the defendant, and declared against him on the said bond, &c., and judgment was thereupon entered up at her suit in the Court of Common Pleas in Ireland; that afterwards, in the year 1834, Alicia Fitzgerald intermarried with, and became the wife of, Francis Leyden; "and that, by the law of that part of the united kingdom called Ireland, Francis Leyden thereby then *became entitled to the said judgment*, and the right thereto, and to assign the same as thereafter mentioned, then became vested in him the said Francis Leyden." The declaration then averred, that, in 1842, Francis Leyden, and Alicia, his wife, by indenture (of which proffert was made) assigned the judgment to Thomas Rumley; that a memorial of such assignment **was duly enrolled*, with an affidavit as required by the 9 G. 2, c. 5; that afterwards, on the 30th of September, 1842, by indenture between Francis Leyden, of the first part, Thomas Rumley, of the second part, and the plaintiff, of the third part, Francis Leyden and Thomas Rumley assigned the said judgment to the plaintiff. It then averred the enrolment of a memorial, &c., as of the first assignment, that the debt and damages recovered by the judgment were and are of the value of 200*l.* English money, and were still unpaid, wherefore, &c. [*593]

The declaration also contained a count for interest, and a count upon an account stated.

The defendant cravedoyer of the indenture of assignment between Francis Leyden, Alicia Leyden, and Thomas Rumley; and, after setting it out, pleaded,—first, that Francis Leyden *did not*, by the law of that part of the united kingdom called Ireland, by reason of his intermarriage

with Alicia Fitzgerald, *become entitled* to the said judgment, nor did the right thereto, and to assign the same in manner in the declaration mentioned, become vested in him, in manner and form, &c. ; upon which issue was joined,—secondly, that Francis Leyden and Alicia his wife did not assign to Rumley,—thirdly, that they did not perfect a memorial,—fourthly, that no such affidavit was made as alleged,—fifthly, sixthly, and seventhly, similar pleas as to the alleged assignment by Francis Leyden and Thomas Rumley to the plaintiff,—eighthly, as to 2*l.* 2*s.* 8*d.*, parcel of the moneys recovered by the said judgment, to wit, for damages for detaining the said debt, payment to Alicia Fitzgerald before her inter-marriage with Francis Leyden,—ninthly, as to 70*l.*, parcel of the sum of 219*l.* 9*s.* 2½*d.* recovered by the said judgment, payment to Francis *594] Leyden and Alicia *his wife, before the assignment to Rumley,—tenthly, to the second and third counts, never indebted.

Issue was joined on all the pleas except the eighth and ninth ; and, as to them, the plaintiff replied, denying the payments therein pleaded, upon which issue also was joined.

The cause came on to be tried before PARKE, B., at the Surrey summer assizes, 1847, when, on behalf of the plaintiff, an examined copy of the judgment-roll was given in evidence ; then, an examined copy of a memorandum of the assignment of the debt, on the foot of the judgment, was tendered, and, after objection, admitted, but *not as evidence of an assignment or memorial*. An examined copy of the enrolment of the memorial on the record, was then tendered, and, after objection, admitted, on the principle that enrolments of record directed by statute are evidence : *Smartle v. Williams*, 1 Salk. 280 : it concluded in these words—
“The execution of which said deed, and of this memorial, by the said Francis Leyden, are witnessed by John Shevlan Maloney, of Bedford Street, Liverpool, gentleman, and Daniel Charles Leyden, of Parliament Street, Liverpool, officer of Customs, Liverpool.

“ FRANCIS LEYDEN (L. s.)

“ ALICIA LEYDEN (L. s.)

“ Signed and sealed in the presence of

“ J. S. MALONEY,

“ D. C. LEYDEN.”

Then followed an affidavit by J. S. Maloney, that he saw the deed and memorial duly executed by Francis Leyden and Alicia Leyden.

Similar evidence was given of the execution of the second assignment ; but the memorial, as enrolled, stated that the deed and memorial were *595] executed by both *Francis Leyden and Thomas Rumley, in the presence of the two witnesses.

The original affidavit made by Maloney, and filed, was admitted.

For the defendant, it was objected,—first, that, as the judgment was a chose in action of Alicia Leyden before marriage, the husband could not dispose of it without first reducing it into possession, and therefore

the defendant was entitled to the verdict on the first issue,—secondly, that the execution of the memorial by Mrs. Leyden was not attested by two witnesses,—thirdly, that the enrolment of the second memorial showed that the judgment was assigned to Rumley *in trust* for the husband, Francis Leyden, and the statute 9 G. 2, c. 5, was intended to apply to assignments *for value only*.

For the defendant, the payment of 2*l.* 2*s.* 8*d.* was proved, as alleged in the eighth plea.

The learned baron reserved the points raised as to the effect of the assignments, and also those as to the evidence; and, subject to them, directed a verdict for the plaintiff; the defendant having leave to move for a nonsuit, or to enter a verdict in his favour on all or some of the issues found for the plaintiff.

Channell, Serjt., in Michaelmas term, 1847, obtained a rule nisi to enter a verdict for the defendant, or for a new trial on the ground of misreception of evidence. He submitted that the issue on the second plea was not made out: and he sought to distinguish the cases of *Hobhouse v. Hamilton*, 1 Sch. & Lefroy, 207, *Malcomson v. Gregory*, 1 Hudson & Brooke, 310, and *Maguire v. Armstrong*, 1 Hudson & Br. 318 n., on the ground, that, in neither of them was there a precise issue taken upon the *assignment, as here; and that, in Ireland, the memorial would be a record. [V. WILLIAMS, J., observed that the [*596 Vice-Chancellor of England had twice held that a chose in action of the wife, does not pass to the husband by the marriage, unless reduced into possession in the lifetime of the wife: and that it is difficult to see how the assignee of a judgment in Ireland can be in a better position than an assignee of a chose in action in England.]

Shee, Serjt., and *Bovill*, in Trinity term, 1848, showed cause. The first question is, whether the effect of the marriage of Francis Leyden with Alicia Eitzgerald was, to vest in the former the property in this judgment. Another question is, whether the plaintiff proved the second issue: and this must depend upon whether the evidence of the memorial and enrolment, unopposed, was sufficient.

The question will mainly turn upon the two Irish statutes of 9 G. 2, c. 5, s. 1, and 25 G. 2, c. 14, s. 1, made perpetual by the 12 G. 3, c. 19, s. 3. The title of the former is, "An act for the more effectual assigning of judgments," &c.: and the 1st section,—reciting that "whereas judgments, statutes-staple, and statutes-merchants, are frequently assigned for valuable considerations, and to protect the purchase of estates, but are no more than equitable securities in the hands of the assignees: and whereas assignees of such judgments, statutes-staple, or statutes-merchants, as the law now stands, cannot revive or discharge the same in their own names, but in the name of the conusees of such judgments, statutes-staple, or statutes-merchants, or their representatives, which is often attended with very great inconveniences; and the conusee may, after such assign-

ment, enter satisfaction on the record of the said judgments, statutes-
*597] staple, or statutes-merchant, without *the knowledge or consent
of the assignee,"—for remedy thereof enacts, "that, from and
after the first day of next Easter term, where any conusee or conusees
of a judgment or judgments, statute-staple, or statute-merchant, his, her,
or their executors or administrators, shall assign the same to any person
or persons whatsoever, such conusee or conusees, his, her, or their execu-
tors or administrators, shall also perfect a memorial of such assignment
under his, her, or their hand and seal, upon parchment or vellum, attested
by two or more credible witnesses; which memorial shall contain the
name or names, and addition, of the person or persons assigning such
judgment or judgments, statute-staple, or statute-merchant, the name or
names of the person or persons to whom the same shall be assigned, and
the sum or sums of money mentioned in such assignment or assignments
to be remaining due and unsatisfied upon such judgment or judgments,
statute-staple, or statute-merchant, with the day and year when such
assignment or assignments is, are, was, or were perfected; and that one
of the witnesses to such memorial, who shall be a witness to the assign-
ment of such judgment or judgments, statute-staple, or statute-merchant,
shall make an affidavit at the foot of such memorial, of the true perfec-
tion of such assignment and memorial, before the respective officer or
officers where such judgment or judgments, statute-staple, or statute-
merchant, is, are, or shall be entered, his or their legal deputy or depu-
ties, or before any one of the judges of the Four-Courts in Dublin, or
before any one of the judges of His Majesty's courts at Westminster,
who are respectively hereby empowered to take such affidavit or affida-
vits; which memorial and affidavit shall be lodged in the proper office
where such judgment or judgments, statute-staple, or statute-merchant,
is, are, or shall be entered; and the several officers of the said courts
*598] are hereby *required to enter such memorial of such assignment,
statute-staple, or statute-merchant, in a roll or rolls of parchment
or vellum, to be kept for that purpose in such respective office or offices
where such judgment or judgments, statute-staple, or statute-merchant,
is, are, or shall be entered; and such officer or officers is and are hereby
required to endorse on such assignment or assignments the day of the
month and year, and hour of the day, whereon such memorial or memo-
rials was or were so lodged and proved; and, for the more easy and
speedy method of finding such assignment or assignments, such respective
officer or officers shall enter the number and roll where such assignment
or assignments is or are registered, at the foot of each respective judg-
ment or judgments, statute-staple, or statute-merchant, so assigned." And the 2d section enacts, "that, from and after such time as such
memorial or memorials of such assignment or assignments shall be
entered on such roll as aforesaid, it shall and may be lawful for the
assignee or assignees of such judgment or judgments, statute-staple, or

statute-merchant, his, her, or their executors, administrators, or assigns, and for no other person or persons whatsoever, to revive such judgment or judgments, statute-staple, or statute-merchant, from time to time, in his, her, or their own name or names, and take out one or more execution or executions on the same, in the name or names of such assignee or assignees, his, her, or their executors or administrators, and to sue forth execution or executions thereon, reciting the special matter, and also to discharge or release the same; and also in his, her, or their own name or names to enter satisfaction on the record of such judgment or judgments, statute-staple, or statute-merchant, in as full and ample manner, to all intents and purposes, as if the conusee or conusees of such judgment or judgments, statute-staple, or statute-merchant, his, her, or their executors or administrators, could or might do; *and that the conusor or conusors of such judgment or judgments, statute-staple, or statute merchant, his, her, or their executors, [*599 administrators, or assigns, may, upon payment to such assignee or assignees, plead payment specially to such assignee or assignees; and that such assignees, their executors or administrators, may from time to time assign the same over in manner aforesaid; and such assignment or assignments shall be proved and registered in the respective offices in manner aforesaid; and such assignee or assignees may revive, and sue out execution or executions, in their own name or names, and discharge and acknowledge satisfaction on, such judgment or judgments, statute-staple, or statute-merchant, in manner aforesaid; any law, usage, or custom to the contrary in any wise notwithstanding." And by the 25 G. 2, c. 14, s. 1,—reciting that "whereas some doubts have arisen upon the construction of the 9 G. 2, c. 5, so far as the said act relates to the assignment of judgments and statutes in the several courts of law therein mentioned,"—for the removing of such doubts, it is declared and enacted "that every assignee or assignees of every judgment or judgments, statute-staple or merchant, that are now assigned, or which hereafter shall be assigned, on record, by virtue of the said act, his, her, or their executors, administrators, or assigns, may not only revive such judgment or judgments, statute or statutes, from time to time, in his, her, or their own name or names, and take out one or more execution or executions thereon, for the recovery of his, her, or their demands thereon, as by the said act, among other things, is directed; but that also such assignee or assignees of such judgment or judgments, statute or statutes, now assigned, or hereafter to be assigned, by virtue of the said act, his, her, or their executors, administrators, or assigns, may bring an action of debt, or otherwise proceed or sue thereon, in *his, her, or their own name or names, and be considered to all intents and purposes in the [*600 place, stead, and condition, either in law or equity, of the assignee or assignees."

It is submitted that the effect of these statutes, is, to make this judg-

ment a chose in action, assignable at law; and that it vested in Dr. Leyden by his marriage with Alicia Fitzgerald, without any act done to reduce it into possession. The statute 9 G. 2, c. 5, in its terms, is exceedingly comprehensive: it is a remedial act, and is to be construed largely, so as to meet the evil it recites, and fully to effect the purpose for which it was intended. It in terms gives the judgment, without the formality of assignment, to the executor of the conusee. By the marriage, the husband becomes identified with the conusee, and entitled to all her rights. If the marriage did not vest the judgment in the husband, there is no power to assign the judgment at all. [CRESSWELL, J. A *feme covert* may part with her interest by matter of record. MAULE, J. The great difficulty is, whether the statute meant to confer upon the wife any power which she did not possess at common law. In fact, the plaintiff must contend that the effect of the statute is, to make the husband conusee.] That is precisely what is contended. East-India Bonds are, by the 51 G. 3, c. 64, s. 4, made transferable by delivery,—put upon the same footing as promissory notes under 3 & 4 Ann. c. 9.(a) If a woman having such securities in her possession, marries, they pass by the endorsement of the husband. In Vin. Abr. *Baron and Feme*, pl. 12, it is said, “If a feme who has a term or interest, as *executrix*, by statute-merchant, takes baron, the baron may grant over the interest, without the feme; and good, in assise.”(b) *601] Again, pl. 14, “If obligation is made to a feme sole, *and she takes baron, and the baron releases all actions, and dies, the feme shall be barred.”(c) The instances given in Com. Dig. *Baron and Feme* (E. 2), are to the same effect. [COLTMAN, J. In Mr. Butler’s note (304) to Co. Litt. 351 a, he says:(d) “With respect to such part of the wife’s personality as is not in her possession,—as, money owing or bequeathed to her, or accrued to her in case of intestacy, or contingent interests,—those are a qualified gift by law to her husband, on condition that he reduce them into possession during the coverture; for if he happen to die in the lifetime of his wife, without reducing such property into possession, she, and not his representatives, will be entitled to it.(e) His disposing of it to another, is the same as reducing it into his own possession.”] In Lord Carteret v. Paschal, 3 P. Wms. 200, it was held, that, if the wife has a judgment, and it is extended upon an *elegit*, the husband may assign it without a consideration; so, if a judgment be given in trust for a *feme sole*, who marries, and by consent of her trustees is in possession of the land extended, the husband may assign over the extended interest; and, by the same reason, if the *feme* has a decree to hold and enjoy lands until a debt due to her is paid, and she is in possession of the land under this decree, and marries, the husband may assign it without any consideration, for, it is

(a) Made perpetual by 7 Ann. c. 25.

(b) Bro. Abr. *Grants*, pl. 157, citing 24 E. 3, 63. (M. 24 E. 3, fo. 63, pl. 62.)

(c) Bro. Abr. *Baron and Feme*, pl. 44, citing 7 H. 6, 2. (T. 7 H. 6, fo. 2, pl. 6.)

(d) This part of the note is an addition in the *sixteenth* edition.

(e) Citing 1 Roll. Abr. 342, 350; Moore, 452; Gold. 160; 2 Vent. 141.

in nature of an extent. Stock in the public funds,—which is a right to receive a perpetual annuity, subject to redemption,—a chose in action,—vests by the marriage in the husband: *Pringle v. Hodgson*, 3 Ves. 619; *Wildman v. Wildman*, 9 Ves. 174, 177. In *Ex parte Barber*, *In re Shaw*, 1 Glyn & J. 1, it was held that the husband alone may sue out a *commission upon a promissory note given to the wife *dum sola*. So, [*602 he may sue for it in his own name: *M'Neillage v. Holloway*, 1 B. & Ald. 218. Lord ELLENBOROUGH, in that case, says: “It is laid down in Coke upon Littleton, 351 b, and Com. Dig. *Baron and Feme* (E. 3), that all chattels personal which the wife has in possession in her own right, are vested in the husband by marriage, although he do not survive her. This is a rule of law universally recognised. The words chattels personal are sufficiently large to cover a negotiable instrument of this sort: it is payable to her order; and, if the relation of husband and wife had not subsisted, a formal endorsement to transfer the property in the instrument would have been necessary. Then, the question is, whether, the marriage having vested the right in the husband, it be necessary to go through the form of an endorsement. The law does not require superfluous acts. Is it then necessary that that should appear on the face of the bill? It can only be necessary as evidence of an election on his part to take to the property in his marital right: but that is unequivocally shown by bringing the action in his own name. No case having been cited to show that a formal endorsement is necessary, I think, that, by the act of marriage itself, he is virtually an endorsee. If he had appeared as such on the face of the bill, there could be no doubt of his right to maintain this action: but the marriage has in fact given him all the rights of an endorsee; and it therefore seems to me to be unnecessary for us to go through the formal derivation of title by endorsement.” The reasons which apply to the ordinary case of a stranger making himself a party to a record by *sci. fa.*, are inapplicable on the present occasion. Every object for which a *sci. fa.* for the husband could be required, is provided for by the *statute. An Irish judgment, under this act, is in the nature of a personal chattel. The effect of marriage is to make [*603 the husband the wife's representative: her separate existence is lost, and merges in her husband, subject to certain modifications. The effect of the act is, to make the husband conusee of the judgment, which he may enforce by action, though not by execution. [MAULE, J. Can he enforce it in any way which does not enable the other party to deny the marriage? That is the difficulty I feel. The main object of the 9 G. 2, c. 5, was, to put an end to suing upon judgments in another person's name or by *sci. fa.*] That certainly was one object, but not the only one.

2. The next question is, whether the assignment alleged in the declaration, was properly proved by the copy of the enrolment of the memorial which was produced. It is clear, upon the Irish authorities which

were cited on the motion, that the memorial enrolled is the proper, if not the only, proof of the assignment, regard being had to the language of the 9 G. 2, c. 5. In *Hobhouse v. Hamilton*, 1 Sch. & Lefroy, 207, upon a bill filed by the plaintiff as assignee of a judgment, it appearing that the deed of assignment of the judgment had been lost, an attested copy of the memorial, which had been duly entered pursuant to the statute, was offered in evidence as proof of the assignment. *Plunket*, for the defendant, objected that the original memorial should be produced: and he compared it to the cases upon the registry act, in which, though it had been decided that the attested copy of the memorial be good evidence of the fact of registry, it was held not to be admissible evidence of the contents of the deed, when, by the loss of the deed, it became necessary to resort to the memorial for secondary evidence, *and *604] that, in all these cases, the memorial itself was produced. But Lord REDESDALE "admitted the distinction as applied to the registry act, viz. that the attested copy of the memorial is evidence only of the fact of registry; but that, if the memorial is meant to be used as evidence of the contents of the deed, the original memorial must be produced. But he held, that, in the case of a judgment, the contents of the deed of assignment were not material: that what appeared on record was the proper evidence of the fact of assignment: that, if a memorial be duly entered, agreeably to the act of parliament, the party cannot say the judgment was not assigned, and can only apply to the court to vacate it if done without authority. His lordship said he had had doubts upon this point in another case, and had looked into the statute, and that he was of opinion, that, by the true construction of the act, the party is bound and concluded by what appears on record, although the assignment might have been forged; and that payment to the assignee on record would be good payment: that, of course, if the record be conclusive as to the fact of assignment, an attested copy of it must be good evidence of that fact, and that there is no occasion to produce the deed of assignment." That case has been followed by *Maguire v. Armstrong*, 1 Hudson & Br. 318, n., and *Malcomson v. Gregory*, Ib. 310, in both of which it was held, that the attested copy of the memorial of the assignment of a judgment, under this statute, is the proper evidence of such assignment. The same thing, in substance, was decided in *Ramsbottom v. Buckhurst*, 2 M. & Selw. 565, where it was held, that, in an action by a plaintiff claiming under an *elegit*, for use and occupation, an examined copy of *605] the *judgment-roll containing the award of *elegit*, and return of the inquisition, is evidence of the plaintiff's title, without proving a copy of the *elegit* and of the inquisition. "The judgment-roll," says Lord ELLENBOROUGH, "imports incontrovertible verity as to all the proceedings which it sets forth; and so much so, that a party cannot be admitted to plead that the things which it professes to state are not true. Would it be competent to aver that there was no such declaration, or

plea, or trial, or that the court did not pronounce such judgment, as stated in the record? I apprehend it would not: and therefore every part of the record, as long as it remains on the files of the court, must be taken to speak absolute verity."

3. Then it is said that the memorial, the examined copy of the enrolment of which was produced, was not attested as required by the statute. The supposed defect is, that it does not appear from the statement in the body of the instrument that the signature of Alicia Leyden was attested by Maloney. But the ordinary attesting clause shows that the execution by Francis Leyden and Alicia Leyden was attested by both the witnesses; and the affidavit at the foot shows that Maloney did in fact attest the execution by Alicia Leyden as well as by Francis Leyden. But for the statement in the body, there would have been no doubt. The execution by husband and wife, is, in point of law, the execution of the husband: *Arnold v. Revault*, 1 Brod. & Bingh. 443, 4 J. B. Moore, 66. The statement, therefore, that the wife executed the instrument, is mere surplusage. [MAULE, J. The attestation clause would have been perfectly true, if the instrument had been executed by the wife only.] *Burdett v. Doe d. Spilsbury*, 6 M. & G. 386, 7 Scott, N. R. 66, decides, that, where certain *formalities of attestation are required by an act of parliament, if the form of attestation that is adopted be [*606 inconsistent with the requirements of the act, it will not do; but that a general attestation *will* do. There, a power of appointment was to be executed "by a will, to be signed, sealed, and published by A. B., in the presence of, and attested by, three credible witnesses:" and it was held to be well executed by an instrument concluding thus,—“I declare this only to be my last will and testament. In witness whereof, I have, to this my last will and testament, set my hand and seal, this 12th of December, 1789,”—such instrument being signed by A. B., and a seal appearing opposite to such signature, and the words “Witness, C. D., E. F., and G. H.,” appearing in the usual place of attestation, and it being shown by extrinsic evidence, that the instrument was in fact so signed, sealed, and published. [CRESSWELL, J. There was nothing there inconsistent with a right attestation; and the evidence was, that it was rightly done.] Here, there is a right attestation.

Channell, Serjt., and *Lush*, in support of the rule. Previously to the passing of the 9 G. 2, c. 5, the law of Ireland, as to choses in action, was the same as the law of England. The main question is, whether this case is within that statute. The preamble of the act explains what was its object, viz. to enable parties to make legal assignments of judgments, where before they could only make equitable assignments. To bring a case within the statute two things must concur,—the party must be the conusee of the judgment, and be under no personal disability to make an assignment. The statute received an interpretation to a certain extent, in this court, in a case of *O'Callaghan v.*

Marchioness Thomond, 3 Taunt. 82, which goes far to show that it is
 *607] *essential that the party whose assignment is set up should be the
 conusee of the judgment. Here, taking the wife to be conusee
 of this judgment, she is under a personal disability. The husband clearly
 does not, by the act of marriage, become conusee of the wife's judgment.
 The authorities as to the necessity of the husband's becoming party to a
 judgment by *scire facias*, to enable him to issue execution, are consi-
 dered in 2 Wms. Saund. 72 l, 72 m. [MAULE, J. Nobody doubts that.
 When you take out execution, you must have a *sci. fa.* The court are
 unanimous in thinking that the husband can only become party to the
 judgment by *sci. fa.*, though that is not expressly mentioned in the act.]
 In Roper on Husband and Wife, (a) it is laid down, that, "for such debts,
 &c., as were due to the wife *before* the marriage, and continue unaltered,
 since the husband cannot disagree to her interest in, and he has only a
 qualified right to, them, viz. by reducing them into possession during
 her life, he is unable to maintain an action for such property without
 making his wife a party." (b) To this Mr. Jacob adds: "To this rule an
 exception has been made in the case of a bill of exchange or promissory
 note payable to the wife *dum sola*. (c) Such instruments, being transfer-
 rable at law, are considered to bear more resemblance to chattels personal
 than to other choses in action. The wife, after the marriage, is unable
 to endorse them: but the husband might pass them by endorsement, (d)
 *608] and thus give to the assignee the right of suing on them in *his
 own name; and he is therefore held to have the same right him-
 self." This explains the principle upon which M'Neillage v. Holloway
 and Ex parte Barber proceeded. In Lord Carteret v. Paschal, the pro-
 perty was treated in equity as land: if it had been extended on *elegit*
 before the marriage, the husband would clearly have been entitled to the
 rents. In Roper, (e) it is said: "The interests [of the wife], amongst
 others, which are assignable at law, are, the personal chattels of the wife
 in possession, legal terms for years, *elegits* upon judgments issued before
 the marriage; and, in analogy to this, he has in equity the same power
 of assigning terms held in trust for her, and debts or sums of money
 secured by such terms, decrees made in favour of the wife *dum sola* for
 money, and that she shall hold the premises until satisfaction." The
 cases adverted to by Mr. Justice WILLIAMS, when this rule was moved,
 are Elwyn v. Williams, 7 Jurist, 337, and Ashby v. Ashby, 8 Jurist,
 1159. (g) In the former, it was held, that, where the husband assigns a
 chose in action of his wife for valuable consideration, and dies before
 either he or the assignee has actually obtained possession of it, leaving

(a) 2d edit., by Jacob, Vol. I. p. 214.

(b) Citing Hardy v. Robinson, 1 Keb. 440; Tiroll v. Bennet, 2 Keb. 69; Re Russel and Wife, Noy, 70; Milner v. Milnes, 3 T. R. 627; Rumsey v. George, 1 M. & S. 176.

(c) Citing M'Neillage v. Holloway, 1 B. & Ald. 218; Ex parte Barber, 1 Glyn & J. 1.

(d) Citing Barlow v. Bishop, 1 East, 432.

(e) 2d edit., Vol. I. p. 224.

(g) Before KNIGHT BRUCE, V. G.

the wife surviving,—it matters not whether the chose in action was reversionary, so that it could not have been reduced into possession, or whether, the wife having become absolutely entitled, it was still left outstanding, and not reduced into possession, through neglect,—in either case, the wife, surviving, will be entitled, as against the assignee for valuable consideration. The Vice-Chancellor says: "I consider the principle laid down by Sir T. PLUMER,^(a) and twice affirmed by the lord *chancellor,^(b) to be decisive of the present question. Whether [*609 the husband dies in the lifetime of the tenant for life, whereby the chose in action cannot, as against the wife, be reduced into possession, or whether he survives, and dies before it is reduced into possession, the same result must, in my opinion, follow; and the consequence is, that, in the present case, a declaration must be made that Mr. Nicholson's covenant, which might operate as an assignment, does not now affect that portion of the chose in action of his wife which was not reduced into possession in his lifetime." So, in *Ashby v. Ashby*, Sir KNIGHT BRUCE held that the surviving wife's right to her chose in action, not reduced into possession, but assigned by the husband during his lifetime, is not defeated by such assignment. A legacy is strictly a chose in action.

2. As to the sufficiency of the proof,—the cases of *Hobhouse v. Hamilton*, *Maguire v. Armstrong*, and *Malcomson v. Gregory*, undoubtedly show that an attested copy of the memorial of the assignment of a judgment, is evidence of the fact of the assignment. But they were cases where the parties were proceeding in the Irish courts, where the judgment was a *record*; and in one of them,—*Malcomson v. Gregory*,—the proceeding was by *scire facias*.^(c) [MAULE, J. Do you say that the assignment has a different effect here from what it has in Ireland?] I must so contend. [MAULE, J. A law in Ireland says that a judgment may be assigned by enrolling a memorial. Another law in Ireland says that the memorial so enrolled shall be a *record*. The first is a law in this country: the other is not; but it is a rule of evidence.]

*8. The next question is, whether this memorial was in conformity with the statute. The statute 9 G. 2, c. 5, s. 1, requires [*610 that there shall be two attesting witnesses to the assignment, and that one of the witnesses to the memorial, shall be an attesting witness to the assignment. There is nothing to show that Alicia Leyden's execution of the assignment and memorial was attested by two witnesses. Not only is it necessary that two witnesses shall be present at the execution, but the fact that they have so subscribed must appear on the face of the record. In *Wright v. Wakeford*, 4 Taunt. 213, it was held, by HEATH, J., LAWRENCE, J., and CHAMBRE, J.,—against the opinion of Sir J.

(a) In *Purdew v. Jackson*, 1 Russ. 1.

(b) By Lord Chancellor KING, in *Lord Carteret v. Paschal*, 3 P. Wms. 197, and by Lord COTTENHAM, in *Honnor v. Morton*, 3 Russ. 65.

(c) See 1 Sch. & Lefroy, 14.

MANSFIELD,—that a power to trustees, with the consent of the *settlers que trust*, testified by writing under *their hands and seals*, attested by two or more credible witnesses, to make sale of lands, is not well pursued, if the attestation be only “*sealed and delivered*” in the presence of the two witnesses; and that an attestation added after many years, witnessing the *signing, sealing, and delivery*, at the time of making the deed, will not supply the defect. And the opinion of the three puisne judges was afterwards acted upon by the Court of King’s Bench in *Doe d. Mansfield v. Peach*, 2 M. & Selw. 576.(a) [CRESSWELL, J. Is the attestation by two witnesses, the “perfection” of the memorial spoken of in the statute?] It is submitted that it is. It clearly would not be *perfected* unless attested in the manner required by the statute.

Cur. adv. vult.

WILDE, C. J., now delivered the judgment of the court.

*611] *This was an action of debt, brought by the plaintiff as assignee of an Irish judgment entered upon on a warrant of attorney. [His lordship stated the pleadings and the facts, *ut antè*, 592.]

With regard to the evidence, we are of opinion that the examined copy of the enrolment of the memorial, was good evidence of the assignment; as was held by Lord REDESDALE in *Hobhouse v. Hamilton*, 1 Sch. & Lef. 207; and that for anything appearing on the face of it, the execution of the assignment and memorial was attested by the two witnesses, whose attestation was in general terms—“Signed and sealed in the presence of John Shevian Maloney and Daniel Charles Leyden.”

If the first assignment was inoperative, for want of due attestation, it might be contended that the second, being executed by Francis Leyden, as well as Rumley, would be valid and effectual, if Francis Leyden had power to assign, as alleged in the declaration, and denied by the first plea. The main question, therefore, arises on the issue so raised, *viz. whether, on the marriage of Francis Leyden with Alicia Fitzgerald, the right to assign the judgment became vested in him.* The judgment being a chose in action of the wife before her marriage, he could not, without the aid of the 9 G. 2, c. 5, have made any valid disposition of it, unless it had first been reduced into possession. In Co. Litt. 351 b, the law is stated in these terms:—“The marriage is an absolute gift of all chattels personal *in possession* in her own right, whether the husband survive the wife or no: but, if they be *in action*, as, debts by obligation, contract, or otherwise, the husband shall not have them, unless he and his wife recover them.” *Garforth v. Bradley*, 2 Ves. sen. 675, *Purdew v. Jackson*, 1 Russ. 19, *Honnor v. Morton*, 3 Russ. 65, *and *Ellison v. Elwin*, *612] 18 Simons, 809, all recognise that rule. Nor could the husband have maintained any proceeding to reduce this judgment debt into possession, without making his wife a party: *Bac. Abr. Baron and Feme*

(a) And see *Moodie v. Reid*, 1 Madd. 516, 7 Taunt. 355; *Doe d. Hotchkiss v. Pierce*, 6 Taunt. 402; *Wright v. Barlow*, 3 M. & Selw. 512.

(F), pl. 14; (a) Com. Dig. *Baron and Feme* (F. 2); *Milner v. Milnes*, 3 T. R. 627.

A case was cited at the bar, from Viner's Abridgment(b)—“If a feme who has a term or interest, as executrix, by statute-merchant, takes baron, the baron may grant over the interest without the feme; and good, in assise:” and Bro. Abr. *Grants*, pl. 157,(c) is referred to. The reason appears in Bro. Abr. *Baron and Feme*, pl. 59,(d) viz. that the term or interest was only a *chattel*, of which the husband might dispose. Now, the statute 9 G. 2, c. 5 (Irish), begins by reciting, “whereas, judgments, statutes-staple, and statutes-merchant, are frequently assigned for *valuable considerations*, and to protect the purchase of estates, but are no more than equitable securities in the hands of the assignees; and whereas assignees of such judgments, as the law now stands, cannot revive or discharge the same in their own names, but in the names of the conusees of such judgments, &c., or their representatives, which is often attended with great inconveniences, and the conusee may, after such assignment, enter satisfaction on the record of the judgments, &c., without the knowledge or consent of the assignee.” The mischief to be remedied, therefore, was, that the assignees of judgments, &c., had equitable securities only, which might be afterwards affected by the misconduct of the assignors. For remedy thereof, it was enacted, “that, from and after, &c., where any *conusee or conusees of a judgment or judgments, statute-staple, or statute-merchant, his, her, or their executors or [*613 administrators, shall assign the same to any person or persons whatsoever, such conusee or conusees, his, her, or their executors or administrators, shall also perfect a memorial of such assignment.” The statute then provides for the enrolment of that memorial of record, with certain formalities. Section 2 provides, that, “after such memorial has been entered on the roll, the assignee, his or her executors, administrators, or assigns, and no other person, may revive the judgment, and issue execution, and acknowledge satisfaction, in his or her own name; and that such assignee, his or her executors or administrators, may, from time to time, assign the same over, in manner aforesaid.”

The object and effect of the statute is, to give *legal securities* to those assignees of judgments, who before had only equitable securities, to enable them to have execution of them in their own name, and to protect the consors who paid to assignees the money secured by such judgments. Francis Leyden, the husband of Alicia Fitzgerald, is not, by the words of the statute, enabled to assign. He was not the conusee of the judgment, nor the representative of the conusee; nor did he, by his marriage, acquire a disposing power over it. And we cannot discover any *intention*

(a) Citing H. 43 E. 3, fo. 10, pl. 31. In that case, the obligation was made to the husband and wife during coverture.

(b) Vol. iv. p. 44, title *Baron and Feme*, (F.), pl. 12.

(c) Citing 24 E. 3, fo. 63.

(d) Citing 37 Ass. pl. 11.

in the legislature to give a disposing power to those who had it not before, nor any words to effect such an object.

We are, therefore, of opinion that Francis Leyden did not, by reason of his intermarriage with Alicia Fitzgerald, become entitled to the said judgment; nor did the right thereto, and to assign the same, become vested in him; and, consequently, the verdict on the first issue joined, must be entered for the defendant.

The second issue is on the plea denying that Francis Leyden and Alicia his wife assigned to Rumley,—which *puts in issue the *614] effect of the deed executed by Francis Leyden and Alicia his wife: and, if we are right in holding that Francis Leyden did not, by his marriage, acquire a right to assign, it follows that the verdict on this issue also must be entered for the defendant.

On the third and fourth issues, it will remain, as found, for the plaintiff; and also on the sixth, seventh, and ninth.

On the fifth, eighth, and tenth, it must be entered for the defendant.

Rule accordingly.

ELLIS v. WATT, Executor of TRENCHARD. Nov. 24.

A defendant sued in a county-court as an executor, pleaded *plene administravit*, and judgment was given for the plaintiff, for the debt, to be levied of assets *quando acciderint*. The plaintiff afterwards took out a summons, suggesting a *devastavit*:—Held, no ground for a prohibition, —although the summons was irregular, in not stating that the assets had come to the defendant's hands after judgment.

THE plaintiff having levied a plaint for 13*l.* 15*s.* 10*d.* in the Wimborne Minster County-Court of Dorsetshire, against the defendant, as the executor of one Trenchard, the defendant, on the 15th of September, 1849, appeared and pleaded *plene administravit*.

The judge gave judgment for the plaintiff for the amount claimed, to be levied of assets *quando acciderint*, and directed the defendant to pay the costs forthwith, which was done. Some time afterwards, the defendant was served with a summons out of the same county-court, suggesting a *devastavit*, which, upon the hearing, on the 13th of October, was dismissed by the judge, on the ground that such summons varied from the judgment given by the court. On the 29th of October, another summons was served, also suggesting a *devastavit*, in which the informality contained in the first was corrected. It appeared, that, on the hearing of the former summons, the judge intimated his intention of investigating and adjudicating the defendant's executorship accounts. *The *615] defendant in his affidavit swore that no assets had come to his hands since the judgment had been given.

Channell, Serjt., now moved for a rule to show cause why a prohibition should not issue to the judge of the county-court, to restrain further

proceedings on the last-mentioned summons. There is no doubt that the proper course, in the superior courts, when judgment against the future assets has been obtained, is to bring a *scire facias* on the judgment, and to suggest that assets have come to the hands of the defendant: Williams on Executors, p. 1705. Here, the summons does not say when the assets came to the defendant's hands. It may mean that they came before plea pleaded; and, if so, it would be in direct contradiction to the plea, which was found for the defendant. By the 9 & 10 Vict. c. 95, s. 78, the judges are authorized to make rules of practice for the county-courts, but, cases to which such rules do not extend, or which are not provided for by the statute, are to be governed by the practice of the superior courts. [MAULE, J. Your application is for a prohibition, which can only be granted where the inferior court has not jurisdiction to proceed.] There may be some doubt, certainly, whether this is a case for a prohibition; but the judge is proceeding in a way not warranted by the practice of the superior courts; and it is submitted that this summons is in the nature of a *scire facias*, which the county-court has no jurisdiction to grant. In *Woodhams v. Newman*, 7 Man. Gr. & S. 654, it was held that a defendant is not entitled to enter a suggestion to deprive a plaintiff of costs, under the 129th section of the county-courts act, where the debt or demand originally exceeded 20*l.*, but is reduced below *that sum by a set-off. Here, the form of summons is that prescribed by the act, where the judgment recovered is *de bonis testa-* [*616
toris. By r. 32, "where judgment has been given against executors and administrators, that the amount be levied upon assets of the deceased *quando acciderint*, the plaintiff may at any time proceed by plaint against them, suggesting that assets have come to their hands; and the court shall proceed and give judgment thereon," &c. The plaintiff should have proceeded under that rule, by a new plaint in the nature of a *scire facias*, suggesting a *devastavit*.

MAULE, J. It is impossible to say that the judge has not jurisdiction. The parties, however, have fallen into a mistake, in applying a form given by the judges on a judgment *de bonis testatoris* to a judgment *quando acciderint*. The defendant may raise an objection, in the nature of a demurrer, to the form of the summons. I think your point is good, and that the judge ought so to decide; in like manner as this court would hold a *scire facias* to be bad, for not showing whether assets fell before or after plea pleaded.

V. WILLIAMS, J. We must give the judge of the county-court credit for knowing the ordinary law on this subject.

Per curiam.

Rule refused.

*617] *THE DUKE OF BRUNSWICK v. SLOWMAN and
Others. Nov. 24.

The want of a date in the jurat of an affidavit, is not cured by a reference to it in another affidavit, as "an affidavit of A. B. sworn on such a day."

Semble, that this court will not give costs where a rule is discharged *solely* on the ground that the affidavit upon which it is founded has a defective jurat.

LUSH, on a former day in this term, obtained a rule calling upon the plaintiff to show cause why the defendant Miles should not be discharged out of custody as to this action, with costs, on the ground that the arrest was contrary to good faith, and also that the *ca. sa.* under which Miles had been arrested, was void by reason of an informality, to which the attorney who appeared for the other defendants in the cause had by a judge's order undertaken, without Miles's assent, not to object. The motion was founded upon the affidavit of the defendant Miles, and also the affidavit of James Berry, his attorney.

Allen, Serjt., and Henniker, objected that Miles's affidavit could not be used, the jurat being defective. They referred to Blackwell v. Allen, 7 M. & W. 146, and Cobbett v. Oldfield, 16 M. & W. 469, to show that an affidavit without date, or with a jurat otherwise defective, cannot be received. [MAULE, J. For anything that appears, this affidavit may have been sworn after the rule was granted.]

Lush, *contra*. In Blackwell v. Allen, there was no date whatever to the jurat: the affidavit might have been a stale one. Here, the jurat has the month and the year; and the affidavit speaks of something that took place after the 13th. [WILDE, C. J. Every affidavit must be certain, and must not be left to be eked *out by extraneous aver-
*618] ments, upon an indictment for perjury.] The other affidavit, which refers to the defective affidavit, cures the defect. [MAULE, J. It refers to it merely as "an affidavit of James Miles, sworn the 16th day of November instant." That does not help you. You cannot make use of it.]

Lush then sought to support his rule upon Berry's affidavit only, but failed.

Allen, Serjt., asked that the rule might be discharged *with costs*.

WILDE, C. J. If this rule had been moved solely on the ground that the arrest of Miles was against good faith, and had been met by a technical objection, I should have thought the rule should have been discharged without costs.^(a) But, inasmuch as the rule was also moved on another ground, viz. to set aside the *ca. sa.*, contrary to the undertaking entered into by the judge's order, for which no good ground has been shown, I think the rule should be discharged with costs.

The rest of the court concurring, Rule discharged, with costs.

(a) In Blackwell v. Allen, the Court of Exchequer intimated, that, in future, they would,—in conformity with the cases of Cooper v. Archer, 12 Price, 149, and Houlden v. Fasson, 6 Bingh. 226, 3 M. & P. 559,—under similar circumstances, discharge a rule with costs. And they followed that course in Frost v. Hayward, 10 M. & W. 673, and also in Cobbett v. Oldfield, *ubi supra*.

And see Pardoe v. Territt, 5 M. & G. 291, 6 Scott, N. R. 273; Leakington v. Atherton, 5 M. & G. 292, n., 6 Scott, N. R. 240.

*SAINTER v. FERGUSON. Nov. 24.

[*619]

The plaintiff obtained a verdict and judgment for 500*l.* damages, and 135*l.* 6*s.* costs: the defendant afterwards became bankrupt, and the plaintiff proved under the *fiat* for the costs only:—The court refused to enter a suggestion of the proof upon the roll,—there being no precedent, and, in the opinion of the court, no necessity, for it.

THE plaintiff having obtained judgment against the defendant in an action for the breach of an agreement, for 500*l.*, and 135*l.* 6*s.* for costs, in Easter term last,^(a) and the defendant having become bankrupt, the plaintiff, on the 7th of June last, proved under the *fiat* for the costs only.

Townsend now moved for a rule calling upon the plaintiff to show cause why a suggestion should not be entered upon the roll, of the fact of the plaintiff having elected to prove under the *fiat*. The 59th section of the 6 G. 4, c. 16, enacts, "that no creditor who has brought any action, or instituted any suit, against any bankrupt, in respect of a demand prior to the bankruptcy, or which might have been proved as a debt under the commission against such bankrupt, shall prove a debt under such commission, or have any claim entered upon the proceedings under such commission, without relinquishing such action or suit; and, in case such bankrupt shall be in prison or custody at the suit of, or detained by, such creditor, he shall not prove or claim as aforesaid, without giving a sufficient authority in writing for the discharge of such bankrupt; and the proving or claiming a debt under a commission by any creditor, shall be deemed an election by such creditor to take the benefit of such commission, with respect to the debt so proved or claimed: provided that such creditor shall not be liable to the payment to such bankrupt or *his assignees, of the costs of such action or suit so relinquished by him," &c. The debt and costs form one entire debt: (b) the [*620 proof of a part, therefore, is an election on the part of the plaintiff to avail himself of the *fiat* altogether. [MAULE, J. Have you any precedent for such an application as this?] This course was suggested in *Kemp v. Potter*, 6 Taunt. 549. There, the action was commenced on the 18th of July, 1815, and the defendant, who was then a bankrupt, on the 21st of July obtained his certificate. On the 17th of November, the defendant filed a plea, of his bankruptcy and certificate. The plaintiff had within the term exhibited under the commission an affidavit of the debt for which this action was brought; whereupon, the defendant had ruled the plaintiff to reply; and the plaintiff obtained a rule nisi to discharge that rule, and all subsequent proceedings, with costs, declaring that he abandoned his action, and had made his election to proceed under the commission. *Lens*, Serjt., opposed the rule, contending that the defendant was entitled to some certain assurance that the action was at

(a) Vide 7 Man. Gr. & S. 716.

(b) Vide *Berry v. Irwin*, ante, p. 622.

an end; and that the plaintiff ought to discontinue. And GIBBS, C. J., said: "The defendant is not proceeding for costs in this case; for, he never can get them. Perhaps he has some reason to complain of the plaintiff, in that he has commenced his action just at the time when the bankrupt is about to obtain his certificate, and has put him to considerable expense. The defendant having pleaded, rules the plaintiff to reply; and this application is made to discharge that rule with costs: and the question is, whether this is not the proper course for the defendant to take, in order to compel the plaintiff to give him that satisfaction to which he is entitled; for, *I think the defendant is entitled to have some entry or suggestion entered on the record, so that it may appear that the defendant* *621] *will be no further troubled in this action*; for, otherwise, the defendant stands under the apprehension that the action may at some time be proceeded in."

WILDE, C. J. The plaintiff has, after judgment, proved under the *fiat* for a part of the judgment-debt. It seems to me that the fact of such proof is quite as good as the suggestion you ask for.

MAULE, J. It does not appear that any such suggestion has ever been entered, or attempted to be entered, on any record whatever, notwithstanding the desire expressed by Lord Chief Justice GIBBS, in *Kemp v. Potter*, to originate such a practice. The case being at an end, I cannot discover any advantage to be gained by the course proposed.

The rest of the court concurring,

Rule refused.

DICK v. BEAVAN. Nov. 26.

An affidavit for a *distringas* to outlawry, stating, that the answers to the attempts made to serve the defendant with the writ of summons at his last known residence here, were, that the defendant is abroad; that all reasonable means and diligence have been ineffectually used to serve the defendant personally, and that the deponent believes the defendant keeps out of the way to avoid service,—is sufficient; a less degree of particularity being required on such an application, than on moving for a *distringas* to compel appearance.

In proceeding to outlawry by writ of summons and *distringas*, the first *exigi facias* is properly tested on the day on which the *distringas* is returned.

A judge's order for a *distringas* was made and dated on the 12th of October, upon a defective affidavit: the affidavit was amended, and re-sworn on the 13th, and the order was then delivered out as of the 12th. Upon a motion to rescind the order and subsequent proceedings thereon, the court allowed the date to be altered to the 13th, upon payment, by the plaintiff, of the costs of the amendment and of the application to rescind the order.

A *DISTRINGAS* for the purpose of proceeding to outlawry against the defendant, was applied for and granted by TALFOURD, J., at chambers, *622] on the 12th of October *last, upon an affidavit stating that the deponent, on the 29th of September, attended at the last known place of abode of the defendant, situate and being No. 14 Stratford Place, Oxford Street, in the county of Middlesex, for the purpose of

serving him with a copy of the writ of summons, and then and there saw and was answered by a person who stated his name to be Thomas Emney, who, on being asked by the deponent, if the defendant lived there, replied that the defendant had left about ten months since, and had gone to reside abroad; he believed, at Paris. The affidavit then proceeded to state, in the usual way, appointments to call, and calls pursuant thereto, at the place before mentioned, for the purpose of serving the defendant; that similar answers (*viz.* that the defendant was abroad) were on each occasion received, and that, on the last call, a copy was left: and it continued thus,—“And this deponent further saith that he hath used all reasonable means and all possible diligence to serve the defendant personally with a copy of the said writ of summons; but, on neither of the said occasions, nor at any other time after the issuing of the said writ, was this deponent able to effect such service; and that, for the reasons aforesaid, this deponent verily believes the said defendant kept, and still keeps, out of the way, to avoid personal service of the said writ:” and concluded with negating the defendant’s appearance to the writ, “*according to the exigency thereof.*”

The order for the *distringas* was made and dated on the 12th of October. The defect in the last paragraph of the affidavit being afterwards discovered, the affidavit was amended, and re-sworn on the 13th, on which day the order was delivered out by the judge’s clerk.

Prideaux, on a former day in this term, moved to rescind the order of the learned judge, and all *subsequent proceedings thereon, for [*623 irregularity, with costs. He submitted, that the affidavit sworn on the 13th of October could afford no foundation for an order bearing date the preceding day; and that, if an indictment for perjury were framed upon it, it would not appear that any judicial proceeding had been taken thereon.

Further, he submitted that the affidavit did not warrant the order, inasmuch as it contained no statement to justify an inference that the defendant had gone abroad with a view to avoid his creditors. In *Grover v. Hindmarsh*, 7 Dowl. P. C. 607, it was held, that, in order to obtain a *distringas* to compel appearance, it is not sufficient to show, that, at the calls, the defendant has been stated to be abroad. [MAULE, J. More strictness has been required in the affidavit on moving for a *distringas* to compel appearance, than where it is to found proceedings to outlawry.] In *Simpson v. Lord Graves*, 2 Dowl. P. C. 10, it was expressly held, that, where the defendant is absent at the time of the endeavour to serve a writ of summons, a *distringas* cannot be moved for, unless grounds are shown from which the court can infer that the defendant is keeping out of the way to avoid being served. [MAULE, J. It does not appear that that was a *distringas* to outlawry.] It must have been. [WILDE, C. J. It is much too doubtful to be relied upon as an authority.] In *Round v. Brown*, 1 Dowl. N. S. 860, it was shown by

letters from the defendant, that he was abroad for the purpose of avoiding process. Here, there is a total absence of facts from which the court can see any intent to delay or avoid process.

By the 8d section of the uniformity of process act, 2 W. 4, c. 39, the *distringas* is to be directed to the sheriff of the county wherein the dwelling-house or place of abode of the defendant shall be situate, and a *624] copy of such *distringas* served on the defendant if he can be met with, or, if not, is to be left at the place where such *distringas* is executed. [MAULE, J. That applies to the *distringas* to compel appearance. The *distringas* to outlawry is regulated by the 5th section, which provides, that, upon the return of *non est inventus* and *nulla bona* as to any defendant against whom such writ of *distringas* as thereinbefore mentioned shall have issued, it shall be lawful to proceed to outlaw such defendant by writs of *exigi facias* and proclamation, and otherwise, in such and the same manner as may now be lawfully done upon the return of *non est inventus* to a *pluries* writ of *capias ad respondendum* issued after an original writ.] That refers to, and incorporates, the 8d section. The service of the *distringas* at the place where it is executed, is a condition precedent to the making the return of *non est inventus* and *nulla bona*. [MAULE, J. Where was this writ executed?] Nowhere.

He also moved that the writs of *exigent* and proclamations, and all subsequent proceedings, might be set aside for irregularity, on the ground that the first writ of *exigi facias* was tested on the day on which the *distringas* was returned, instead of on the return day,—citing Vere v. Gowar, 3 N. C. 503, 4 Scott, 287. [MAULE, J. That is precisely in accordance with the 5th section of 2 W. 4, c. 39, and all the books of practice lay it down that the *exigi facias* is properly tested on the day of the return of the *distringas*.](b)

WILDE, C. J. The court think you are entitled to a rule upon the first point, but that neither of the others can be sustained.

*625] *Wallinger, Serjt., now showed cause. The fact of the learned judge's order bearing date on the day on which the affidavit had been originally sworn, gives rise to no discrepancy or ambiguity, inasmuch as it was not delivered out, and therefore was not operative as an order, until the 13th, when the affidavit was re-sworn. [V. WILLIAMS, J. You should have had the order amended at the time. WILDE, C. J. It is clearly an irregularity: but I think it is competent to the court to allow it to be amended, on payment of costs.]

Prideaux, in support of his rule. The court or a judge has no jurisdiction to make an order for a *distringas*, unless the affidavit upon which the application is founded, is duly sworn at the time the order is made. [MAULE, J. In point of fact, the order here was not issued until the affidavit had been perfected.] It was a complete and perfect order on the 12th. This is not a case in which the court will allow an amend-

(a) See Cox v. Beavan, antè, p. 334, and 337, note (a).

ment. In *Doe d. Hill v. Tollett*, 1 D. & L. 121, where a party obtained a rule nisi upon affidavits which were badly intituled, and, discovering his mistake, he applied to the court for leave to take the affidavits off the file, and amend and re-swear them,—the court refused to allow such a course to be taken, *on the ground that the affidavits would appear to have been sworn after the rule was drawn up*; and they also refused to allow a fresh rule to be drawn up, on amended affidavits, but suggested a new motion, upon affidavits disclosing the circumstances of the error, giving no opinion, however, upon the validity or effect of such new motion.

WILDE, C. J. The court is perfectly satisfied that the only objection here, is, that the order of my brother *TALFOURD was by mistake [*626 misdated. Until delivered out, it was no order at all, and could not be available for any purpose. The only difficulty we have felt, is, as to the amendment. Now, I find many analogous cases in which amendments have been made. In *Stevenson v. Castle*, 1 Chitt. Rep. 849, a writ of *ca. sa.* varying from the judgment in the statement of the sum recovered, the court allowed the writ to be amended, on showing cause against a rule for setting it aside, on payment of costs,—the defendant undertaking to bring no action. So, in *Walker v. Hawkey*, 5 Taunt. 858, 1 Marsh. 399, where a writ of *capias ad respondendum* was made returnable on a day certain, instead of being made returnable on a general return day, the court allowed the writ to be amended,—even after a rule nisi had been obtained to quash it for irregularity. I perfectly well remember having myself been concerned frequently in similar motions. I think the rule should be discharged, on payment of costs by the plaintiff, and that the plaintiff should have liberty to amend the judge's order, on payment of costs.

V. WILLIAMS, J. This is as clear a case as could possibly be conceived. I think it would be the height of absurdity to yield to Mr. *Prideaux's* objection.

Rule discharged accordingly.

END OF MICHAELMAS TERM.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
AND UPON
WRITS OF ERROR,
IN THE EXCHEQUER CHAMBER
AND
HOUSE OF LORDS,
IN
Michaelmas Vacation,
IN THE
THIRTEENTH YEAR OF THE REIGN OF VICTORIA.

The judges who sat in *banco* in this vacation, were—

MAULE, J.

V. WILLIAMS, J.

CRESSWELL, J.

TALFOURD, J.

LORD v. HALL. Dec. 6.

Upon an issue as to the endorsement of a promissory note by J. S., it was proved, that the wife of J. S. had the general management of his business; that she was in the habit of drawing, accepting, and endorsing bills and notes in his name; and that the name of J. S. was endorsed upon the note in question by his daughter, by the direction and in the presence of her mother, by whom the note was afterwards handed to the plaintiff:—Held, that it was a question of fact for the jury, whether the endorsement so made was within the scope of the wife's authority; and that the evidence warranted them in concluding that it was.

ASSUMPSIT. The first count of the declaration alleged that the defendant, on the 8d of May, 1844, made his promissory note in writing, and

thereby *promised to pay to the order of Joseph Shuttleworth the sum of 25*l.*, three months after the date thereof, and delivered the same to the said Joseph Shuttleworth; and that Joseph Shuttleworth endorsed the same to the plaintiff, &c. [*628

Second plea,—that the said Joseph Shuttleworth did not endorse the note, *modo et forma*; whereupon issue was joined.

The cause was tried before V. WILLIAMS, J., at the first sitting at Westminster, in Trinity term last. It appeared that Shuttleworth was a mathematical instrument maker; that his wife was in the habit of managing all his affairs, and, amongst other things, drawing, accepting, and endorsing bills in his name; and that the note in question was endorsed by Shuttleworth's daughter, in his name, in the presence and by the direction of her mother; and that it was then delivered by the latter to the plaintiff.

On the part of the defendant, it was insisted that the issue on the endorsement must be found for the defendant; for, that the mother had no right thus to delegate to her daughter the authority to endorse.

The learned judge overruled the objection, and directed a verdict for the plaintiff for 31*l.* 10*s.*, the amount of the note and interest,—reserving leave to the defendant to move to enter a verdict for him on the second issue, if the court should think the endorsement by Shuttleworth was not well proved.

Humfrey accordingly obtained a rule nisi, against which

Whitehurst now showed cause. It appeared at the trial that Shuttleworth's business was generally managed by his wife; that she was in the habit of drawing, accepting, and endorsing bills and notes in his name; *and that she, having previously by the hand of her daughter [*629 endorsed the note in question, delivered it to the plaintiff. The endorsement by the daughter by the direction and in the presence of her mother, was clearly an act of the latter: *Qui facit per alium facit per se*. This is not, as suggested, a delegation of a delegated authority. Suppose Mrs. Shuttleworth, from some accidental cause, were rendered unable to make the endorsement with her own hand, could it be said that she was precluded from using the hand of another person for that purpose? A recognition of an act of an agent binds the principal. Where a man hands over a bill or note with his acceptance or endorsement upon it, he is estopped from afterwards saying that the acceptance or the endorsement is not his: and here Shuttleworth would be estopped from denying his endorsement, by the act of his acknowledged agent in delivering over the note, endorsed, to the plaintiff.

Humfrey, in support of his rule. The note is handed over by Mrs. Shuttleworth to the plaintiff, with an unauthorized,—a forged,—endorsement by the daughter. How can the defendant be estopped, by something done to the note after it had passed out of his hands, from denying that the endorsement was the endorsement of Shuttleworth? [MAULE,

J. Shuttleworth was estopped: he has done something which amounts to an order. If the endorsement by the daughter was made under the authority of the father, it is no forgery. The substantial right of the defendant is, to be secure that he pays the right person. The question is whether this was not really the act of the wife.] If the wife might lawfully delegate her authority to the daughter in this way, what is there to prevent the daughter delegating it in her turn to another? [MAULE, J. It is conceded that one having an authority of this sort, cannot *delegate it.] In *Toms, app., Cuming, resp.*, 7 M. & G. 88, 8 *680] *Scott, N. R. 910, 1 Lutw. Reg. Cas. 200*, this court held that a notice of objection under the registration act, 6 & 7 Vict. c. 18, s. 17, must be signed by the hand of the party objecting. [MAULE, J. Nobody denies the power of the legislature to require a signature by *the hand* of the party. If the authority given to the wife here, was, to endorse by all means which would make the endorsement enure as an endorsement by her, this clearly would be an execution by her of that authority, and no delegation.] To hold that the wife could by any other hand than her own exercise the authority confided to her by her husband, would be to lay down a doctrine which will be very embarrassing to commercial transactions.

MAULE, J. It seems to have been put at the trial, as a question of law, whether the rule, *delegatus non potest delegare*, applied, so as to entitle the defendant to a verdict upon the second issue. It seems to me, however, that this was far from being a correct view of the matter: the maxim has no application at all here. The question is, whether, upon the evidence, the wife was not acting in the strict exercise of the authority conferred upon her by her husband, in doing what she did, viz. in requesting a third person to do it in her presence. There was evidence that the wife had the general management of her husband's business. And, when he authorized her to draw, accept, and endorse bills in his name, that may fairly be extended to authorizing her to select some person, *pro hac vice*, to write the name of her husband for her. It may be that this may lead to some inconvenience. But, her husband having trusted her to exercise her discretion as to drawing, accepting, and *681] endorsing, may be assumed to *trust her also to use her discretion to select the hand of another to carry her intention into effect. I think, and I believe the rest of the court agree with me, that there was evidence for the jury upon this issue: and there could be very little doubt as to the conclusion the jury would come to. I therefore think the verdict ought not to be disturbed. I find a case of *Ex parte Sutton*, 2 Cox, B. C. 84, which may be worth considering with reference to this subject. It was there held that an authority given to A. to draw bills in the name of B., may be exercised by the clerks of A. The way in which that case seems to me to apply to the present, is this,—the lord chancellor treats the extent of the authority as a matter of fact to be inferred from

the evidence: and that confirms the view we have taken upon this occasion.

CRESSWELL, J. I agree with my brother MAULE that this rule ought not to be made absolute. Both parties seem to have treated the question at the trial as one of law. That was clearly a mistake. It was purely a question for the jury, whether or not the evidence showed an authority given by the husband to the wife to endorse in the way which was adopted here. I am not prepared to say what verdict I should have been disposed to concur in if I had been on the jury. Many reasons might be urged to influence a decision either way. The authority of an agent ought not to be unduly extended.

The rest of the court concurring,

Rule discharged.

*VINES v. ARNOLD. Dec. 4.

[*682

A. having a demand against B. for 17*l.* and 21*l.* 10*s.*, in respect of two several parcels of goods, levied a plaint against him in the county-court for the first-mentioned sum: on the day appointed for the hearing, A. did not appear; whereupon, B. admitting the cause of action; the judge pronounced judgment for A. for 17*l.* A. afterwards brought an action in this court for the 21*l.* 10*s.*; to which B. pleaded the recovery against him in the county-court,—averring that A. had at the hearing *abandoned the excess of his demand* beyond the 17*l.*, pursuant to the 63*d* section of the 9 & 10 Vict. c. 95:—Held, on a traverse of that allegation,—that the above facts disproved the plea; for, that the mere levying a plaint for a part of the demand, was not, *per se*, an abandonment of the excess.

DEBT, for goods sold and delivered.

Pleas,—first, never indebted,—secondly, that, before the commencement of the suit, and at the time of the entering of the plaint, and of the issuing of the summons thereafter mentioned, to wit, on the 16th of January, 1848, the defendant dwelt within the district for which the Lambeth County-Court of Surrey, held at Denmark-Hill, Camberwell, was then, and still is, holden, and within the jurisdiction of that court; that the plaintiff then dwelt within twenty miles from the defendant, and that the plaintiff was not, nor was the defendant, an officer of that court; that the defendant was then indebted to the plaintiff, as well in the said moneys, and for and in respect of the said causes of action, in the declaration mentioned, as also in the sum of 17*l.* for the price and value of goods before then sold and delivered by the plaintiff to the defendant, at his request; that the plaintiff then had cause of one action against the defendant, as well for and in respect of the said moneys and causes of action in the declaration mentioned, as for the said 17*l.*, and the same wholly arose within the jurisdiction of the said court; that the said cause of action then was for more than, and exceeded, the sum of 20*l.*, and amounted in the whole to a larger sum, to wit, 38*l.* 10*s.*; that *the said cause of action then formed and constituted together, [*683 and was, one entire debt and demand against the defendant, and

for the recovery of the whole of the same a plaint then might and could have been entered by the plaintiff against the defendant at the said county-court, under the statute made and passed in the session of parliament held in the ninth and tenth years of the reign of our Lady the now Queen, intituled "An Act for the more easy recovery of small debts and demands in England," and he might by law, and according to that statute, have recovered the same in and by a plaint and action at his suit against the defendant in the said court, if the same had not been more than 20*l.*; that the plaintiff thereupon, for the recovery of the said sum of 17*l.*, to wit, on, &c., commenced and brought a suit against the defendant in the said Lambeth County-Court of Surrey, held at Denmark-Hill, Camberwell, as aforesaid; that, for that purpose, the plaintiff then entered, in a book kept for that purpose, at the office of the clerk of the court, a plaint in writing, stating the names and last known places of abode of the plaintiff and the defendant, and the substance of the action intended to be brought, according to the statute in such case made and provided; that the plaintiff therein stated that the said action was brought for the recovery of the said sum of 17*l.*, and the said plaint was then numbered A. 245, according to the order in which it was entered; that, the said plaint being so entered, thereupon, to wit, on, &c., a summons, stating the substance of the said action, and bearing in the margin thereof the same number as the said plaint was numbered, was, within the jurisdiction of the said county-court, issued out of that court, under the seal thereof, at the suit of the plaintiff, against the defendant, and whereby the defendant was summoned to appear at the Lambeth County-Court of Surrey, to *be holden at Denmark-Hill, Camberwell, on the 8d of February, 1848, at the hour of twelve at noon, to answer the plaintiff in an action on contract for the recovery of the said sum of 17*l.*; that he, the defendant, having appeared in the said action at the said county-court, according to, and as required by, the said summons, and having defended the said action in the said county-court, such proceedings were thereupon had in that action, and upon the said plaint, in that court, that afterwards, to wit, on the 8d of February, 1848, the said action came on to be tried in the said Lambeth County-Court, at and within the jurisdiction of the said court, before G. C., Esq., the judge thereof, at which time and place the plaintiff was duly, as required by law, called upon to appear, *but did not appear*; that the defendant then and there did appear, and then admitted the said cause of action to the full amount of the said sum of 17*l.*; that thereupon it was adjudged by the said court that the plaintiff should recover against the defendant the said sum of 17*l.* for his debt, together with the costs of suit, amounting to the sum of 2*l.* 8*s.* 8*d.*; that it was then ordered by the said court that the defendant should pay the same by instalments of 1*l.* 10*s.* every four weeks, until the same should be wholly paid, the first payment to be made on, &c.; that the said judgment was then entered of record in the

said court,—as by the record and proceedings thereof, remaining in that court, would more fully appear; that the said judgment had not been rescinded, reversed, or altered; that the plaintiff did, to wit, on the said hearing of the said action, abandon all demands in respect of, and the whole of, the said cause of action against the defendant, save and except as to the said sum of 17*l.*; and that the said judgment of the said court upon such plaint as aforesaid, was, and still is, according to the said statute, in full discharge of all *demands in respect of the said [*635 cause of action. The plea then concluded with averments of identity of the parties, and that the cause of one action in the county-court was the same identical cause of action as that in the declaration mentioned.

The plaintiff replied, traversing the alleged abandonment of the excess beyond 17*l.* in the county-court. Issue thereon.

The case was tried before COLTMAN, J., at the second sitting at Guild-hall, in Hilary term last. The facts were as follows:—The plaintiff was a flour-factor; the defendant a baker, residing and carrying on his business within the jurisdiction of the Lambeth County-Court. On the 21st of January, 1847, the defendant purchased of the plaintiff ten sacks of flour, at 85*s.* *per* sack; and a note of the amount, 17*l.*, was given to him by the plaintiff. On the 1st of February, in the same year, the defendant bought of the plaintiff other ten sacks, at 48*s.* *per* sack; and on that occasion a bill of both parcels was sent in, amounting to 38*l.* 10*s.*, deducting 4*l.* 10*s.* for short weight and damage.

In January, 1848, the plaintiff levied a plaint against the defendant in the Lambeth County-Court, for a debt of 17*l.* The matter came on for hearing on the 8d of February, when, the defendant being present, and admitting the debt, *but the plaintiff not appearing*, the judge made an order for the payment of the amount by monthly instalments of 30*s.* each,—the costs of the defendant's attendance to be allowed, if the plaintiff declined to take the order. It did not appear that the plaintiff had availed himself of this judgment. He afterwards brought this action to recover the 21*l.* 10*s.*, for the second parcel of flour.

On the part of the plaintiff it was insisted, that, inasmuch as he had not appeared in the county-court, and consequently there had been no abandonment of the *excess of his debt over 20*l.*, the case was not affected by the 68d section of the 9 & 10 Vict. c. 95.(a) [*636

The learned judge directed a verdict to be entered for the plaintiff on the first issue, and for the defendant on the second,—reserving to the former leave to move to enter a verdict for him on the second issue also,

(a) Which enacts, "that it shall not be lawful for any plaintiff to divide any cause of action for the purpose of bringing two or more suits in any of the said [county] courts, but any plaintiff having a cause of action for more than 20*l.*, for which a plaint might be entered under this act if not for more than 20*l.*, may abandon the excess, and thereupon the plaintiff shall, on proving his case, recover to an amount not exceeding 20*l.*; and the judgment of the court upon such plaint shall be in full discharge of all demands in respect of such cause of action, and entry of the judgment shall be made accordingly."

damages 21l. 10s., if the court should be of opinion that the evidence negated the second plea.

Hawkins, in Hilary term last, obtained a rule nisi accordingly. He submitted, that, the plaintiff not appearing in the county-court, the judge thereof could not, and in point of fact did not, put him to his election to abandon so much of his entire demand as exceeded 20l.; that the proper course for the defendant to pursue in the county-court, was, to call upon the judge to nonsuit the plaintiff for not appearing, or, in the event of his appearing, to object to the jurisdiction, unless the plaintiff would, under s. 63, elect to take a verdict for 20l., and to abandon the excess. [MAULE, J. There may be a verdict for the plaintiff, although he does not appear. The 179th section enacts, "that, if, upon the return day of any summons, or at any continuation or adjournment of the said court, or of the cause for which the said summons shall have been issued, the plaintiff shall not appear, the cause shall be struck out; and, if he shall appear, but shall not make proof of his demand to the satisfaction of the court, it shall be lawful for *the judge to nonsuit the plaintiff, or *687] to give judgment for the defendant; and, in either case, where the defendant shall appear, and shall not admit the demand, to award to the defendant, by way of costs and satisfaction for his trouble and attendance, such sum as the judge in his discretion shall think fit; and such sum shall be recoverable, &c.: Provided always, that, if the plaintiff shall not appear when called upon, and the defendant, or some one duly authorized on his behalf, shall appear, and admit the cause of action to the full amount claimed, and pay the fees payable in the first instance by the plaintiff, the court, if it shall think fit, may proceed to give judgment as if the plaintiff had appeared."]

Joyce now showed cause. At the time of levying the plaint, the plaintiff had *one* cause of action only for 38l. 10s.; for, according to the decision of the Court of Exchequer in *Aykroyd, In Re*, 1 Exch. 479, 5 D. & L. 701,—which has since been acted upon in both the other courts,—“cause of action,” in the 63d section of the 9 & 10 Vict. c. 95, means “cause of *one* action,” and is not limited to an action on one separate contract.(a) And it is admitted on the pleadings in this case, that the debt mentioned in the declaration and the debt claimed in the county-court are identical. [*Hawkins*, contra, denied this.] The plaintiff could not split his demand. [TALFOURD, J. The issue is, whether or not the plaintiff made his election, under s. 63, to abandon so much of his demand as exceeded the jurisdiction of the county-court.] Suing *688] in the local court was an election. [MAULE, J. *The 63d section in terms prohibits the splitting of demands so as to bring two suits in the county court: but it does not, in terms, prohibit the

(a) i. e. where there is a course of dealing evidencing an intention that the whole shall terminate in one contract. *Quære*, whether, in the principal case, the sending in of a second bill, including both parcels, was evidence of such an intention?

splitting a demand, for the purpose of bringing one suit in the county-court, and another in the superior court.] The 68d section expressly provides that the judgment of the county-court upon the plaint "shall be in full discharge of all demands in respect of such cause of action." [MAULE, J. That is, where the plaintiff has been called upon and has consented to abandon the excess, "and entry of the judgment shall be made *accordingly*."] That means merely the legal effect of such a judgment. [MAULE, J. I should say it means—something showing that a larger sum was found to be due, and the excess abandoned.] The replication, it is submitted, does not fairly raise the objection. By seeking to avail himself of the assistance of the county-court, the plaintiff admitted that the matter was within the jurisdiction of that court; and he could only give the court jurisdiction by abandoning all over 20%. [V. WILLIAMS, J. All that that proves, is, that the trial in the county-court was *coram non judice*. MAULE, J. The defendant, I should think, might waive the condition of abandonment, which was for his benefit.]

Hawkins, in support of his rule. The second plea alleges that the plaintiff *did not appear* at the hearing; and then it goes on, somewhat inconsistently, to aver that he did, "on the said hearing of the said action, abandon all demands in respect of, and the whole of, the said cause of action against the defendant, save and except as to the said sum of 17l.:" and the replication distinctly traverses this allegation. All the evidence offered to sustain the issue, was, that the plaintiff did not appear at the county-court when the cause came on for hearing, and that the defendant admitted the debt, *and got the judge to give judgment for the plaintiff for 17l. His proper course was to get [*639 the cause struck out, or a nonsuit entered. There is no pretence for treating this as a case of abandonment.

MAULE, J. I am of opinion that there must be something done by the plaintiff to constitute an abandonment of the excess of the demand, within the 68d section of the statute. Where the debt exceeds the sum to which the jurisdiction of the court extends, that enures as a defence, and entitles the defendant to judgment, unless the plaintiff elects to bring himself within the jurisdiction, by abandoning the excess. The plaintiff has clearly a right to elect whether he will so abandon, or yield to the objection, and submit to be nonsuited. The legislature never could have intended anything so unreasonable as Mr. *Joyce* has contended for; and there certainly are no words in the 68d section which require us to put such a construction upon it. I think the rule must be made absolute.

CRESSWELL, J., had gone to chambers, having first intimated his acquiescence in the judgment about to be pronounced.

V. WILLIAMS, J. I also am of opinion that the defendant in this case has failed to prove the material allegation in his second plea, which was put in issue by the replication.

TALFOURD, J. I am of the same opinion. The 68d section of the 9

& 10 Vict. c. 95, furnishes strong grounds for supposing that there must be some act of abandonment in the county-court, beyond the mere levying of a plaint, as has been suggested. Rule absolute.

*640] *DEVAUX and Another v. CONOLLY. Dec. 10.

The plaintiffs, merchants in London, ordered of the defendant, a merchant at Singapore, two parcels, of 25 tons and 150 tons respectively, of terra japonica, "provided it can be laid down here, all charges included, at 18s. *per* cwt." The defendant sent to the plaintiffs invoices and bills of lading representing that two parcels, respective of those weights, had been shipped to their order, and, at the same time, drew bills upon them for the price, which the plaintiffs, upon the faith of the representation contained in the invoices and bills of lading, accepted, and duly paid. Upon the arrival of the goods in London, the net weight,—exclusive of packages, which consisted of baskets and leaves,—proved to be 24 tons and 132½ tons only. The plaintiffs took the goods, and sold them; and now brought money had and received to recover back the sum overpaid, as upon a partial failure of consideration.

Upon a special case, stating it to be the custom at Singapore to purchase terra japonica by gross weight as packed, and in London to sell it *net*:—Held, that the plaintiffs were entitled to recover.

THIS was an action of assumpsit, for money had and received, money paid, and money found to be due on an account stated.

The defendant pleaded non assumpsit.

The cause was tried before WILDE, C. J., at the sittings in London after Hilary term, 1848, when a verdict was found, by consent, for the plaintiffs, damages 162*l.* 11*s.* 8*d.*, subject to the opinion of the court upon the following case,—for the purpose of which, it was agreed that inferences of fact should be drawn by the court:—

The plaintiffs are merchants in London, in connexion with French commercial establishments. The defendant is a partner in a mercantile house at Singapore, trading under the firm of Spottiswoode & Conolly.

The following correspondence took place between the parties, at the dates therein mentioned, and was put in evidence by the plaintiffs:—

"London, 14 January, 1839.

"Messrs. Spottiswoode & Conolly, Singapore.

*641] "Gentlemen,—We have now the pleasure of *addressing you a small order for our friend M. S. Legras, of Rouen, viz. twenty-five tons of terra japonica, or gambier, in squares, of good merchantable quality, in baskets, or other suitable packages, *provided it can be laid down here, all charges, commission, insurance, and freight included, at a price not exceeding 18s. per cwt.* We limit the execution of this order to three months from the arrival of the present, either by original, duplicate, or triplicate. Yours, &c., C. DEVAUX & Co."

The terra japonica, or gambier, is a gum obtained from the acacia tree, and is used by dyers.

On the 19th of January, 1889, the plaintiffs wrote to the defendant, as follows :—

“ London, 19 January, 1889.

“ Messrs. Spottiswoode & Conolly, Singapore.

“ Gentlemen,—We confirm our respects of the 14th instant. We have now the pleasure of addressing you the following orders, on account of our friends, Messrs. Lefebvre, Vidal, & Co., and Messrs. Fandon & Co., of Havre, who order the same on joint account, (*inter alia*) one hundred and fifty tons of terra japonica, or gambier, in packages, giving the preference to baskets, *if the same can be laid down here at a price not exceeding 17s. to 18s. per cwt., all charges, freight, and insurance included.* It is understood, if you cannot get all, you may execute any part of the 150 tons. We limit you for the execution of these orders, to from three to four months from the date of the arrival of this letter, by original, duplicate, or triplicate. For the payment of these orders, we shall arrange with Messrs. Small, *Colquhoun, & Co., to whom you will please forward bill of lading and policies of insurance.” [*642

“ Yours, &c.

C. DEVAUX & Co.”

Messrs. Small, Colquhoun, & Co., mentioned in the preceding letter, were the defendant's agents in London.

On the 9th of May, 1889, the following letter was addressed by the defendant's house at Singapore to the plaintiffs :—

“ Singapore, 9th May, 1889.

“ Messrs. Devaux, London.

[This letter related to other transactions. It acknowledged the receipt of the plaintiffs' two letters of the 14th and 19th of January, and contained the following passages :]—

“ Your letter of the 19th of January contains an order from you for Messrs. Lefebvre, Vidal, & Co., and Messrs. Fandon & Co., of Havre, on joint account, for 100 tons of cutch, &c. ; and also for 150 tons of terra japonica, in baskets, provided we can lay it down with you, all charges included, at a price not exceeding 17s. to 18s. per cwt. You limit us, for the execution of these orders, to from three to four months from the arrival of your letter ; and we notice, if we cannot execute the whole of the order for the 150 tons of gambier, we may send as much of it as we can. There is at present no vessel loading for Havre ; but, should there be, when we have any of the above orders ready for shipping, we will endeavour to get one-half of each sent on there.

“ We have every reason to expect, unless some very large orders arrive from England, to be able to execute the order for 150 tons of gambier ; but, at present, all the large manufacturers of it are engaged to different houses here, for quantities ; and, until they have *fulfilled their engagements, we cannot get them to contract with us. [*643

“ Yours, &c.

“ SPOTTISWOODE & CONOLLY.”

On the 18th of May, 1839, the defendant's house again addressed the plaintiffs, as follows:—

“Singapore, 18th May, 1839.

“Messrs. C. Devaux & Co., London.

“Gentlemen,—We beg reference to the accompanying duplicate of our last respects of date the 9th instant, and now wait on you to advise having shipped, in the Gilbert Henderson, the 25 tons of terra japonica ordered in your letter of the 14th January last, amounting, as *per* invoice, to Sp. \$1283.61,—bill of lading and invoice of which we have this day forwarded to Messrs. Small, Colquhoun, & Co.; also first of exchange drawn by us, on you, in their favour, at six months' sight, for 304l. 16s. 2d. sterling, being amount of invoice, at the exchange of 4s. 9d. *per* Sp. \$; and we hope the same will be duly honoured by you, on presentation. We are now going on with the other order for 150 tons of terra japonica, and hope to be able to execute both it and the one for 200 tons.

“Yours, &c.

“SPOTTISWOODE & CONOLLY.”

By the same mail by which the preceding letter was sent to the plaintiffs, the following invoice and bill of lading was sent by the defendant to Messrs. Small, Colquhoun, & Co.:—

“Invoice of 386 baskets of gambier shipped on the Gilbert Henderson, by the undersigned, and consigned to Messrs. Small, Colquhoun, & Co., for account and risk of Messrs. C. Devaux & Co., London:—

*644]	*386 baskets, weighing 420 peculs, 11 catties, \$2½	-	-	-	-	-	\$1155 30
	“Charges:						
	“Boat and coolie hire, marking, weighing, and shipping,	-	-	-	-	12	00
	“Godown rent @ 2½ cents per basket,	-	-	-	-	9	65
	“Insurance on \$1400 @ 8 per cent., including ½ per cent. for effecting						
	ditto, and policy-fee, 4	-	-	-	-	46	00
	“Commission, at 5 per cent.	-	-	-	-	66	66
							128 31
							\$1283 61

The bill of lading was in the usual form, making the goods deliverable to ——— or assigns, on payment of freight at 5l. 5s. per ton.

The gambier therein mentioned, which had been purchased by the defendant's firm for the plaintiffs, was shipped according to this bill of lading, arrived with the vessel, and was delivered to the plaintiffs, as hereinafter mentioned.

On the 14th of June, 1839, the defendant's house addressed the following letter to the plaintiffs:—

“Singapore, 14th June, 1839.

“Messrs. C. Devaux & Co., London.

“Gentlemen,—We had last the pleasure on the 4th instant; and since then have got the 150 tons of terra japonica, ordered by you for account of Messrs. Lefebvre, Vidal, & Co., and Messrs. Fandon & Co., of Havre, shipped on board the Elphinstone; and by this opportunity have for-

warded invoice and bill of lading of the same to Messrs. Small, Colquhoun, & Co., and draw on you for the amount, in their favour, say, 1865*l*. 0*s*. 8*d*. sterling.

Yours, &c.

"SPOTTISWOODE & CONOLLY."

By the same mail by which the preceding letter was sent to the plaintiffs, the following invoice and bill of lading were sent by the defendant to Small, Colquhoun, & Co.:—

*"Invoice of 2183 baskets gambier shipped on the Elphinstone, [*645 by Spottiswoode & Conolly, and consigned to Messrs. Small, Colquhoun, & Co., to order and for account and risk of Messrs. C. Devaux & Co., of London:—

"2183 baskets, weighing 2520 peels, 58 cattie @ \$2, ⁸⁰ / ₁₀₀	-	-	-	-	-	\$7057 02
"Charges:						
"Boat and coolie hire, marking, weighing, and shipping,	-	-	-	-	-	\$90 00
"Godown rent at 2½ cents per prail,	-	-	-	-	-	63 14
"Insurance on \$8800 at 3 per cent., including ½ per cent for effecting,	-	-	-	-	-	
and policy-fee 4, Ex. 4½	-	-	-	-	-	268 00
						421 14
						\$7478 76
"Commission, at 5 per cent.	-	-	-	-	-	373 93
						\$7852 69

The accompanying bill of lading made the goods deliverable unto order or assigns, he or they paying freight at the rate of 5*l*. sterling *per* ton.

The gambier therein mentioned, which had been purchased by the defendant's firm for the plaintiffs, was shipped according to this bill of lading, arrived with the vessel, and was delivered to the plaintiffs as hereinafter mentioned.

The ship Gilbert Henderson arrived in London on the 18th of September, 1889, and the invoice and bill of lading relating to the shipment by that vessel were delivered by the defendant's agents to the plaintiffs, in exchange for their acceptance of the bill of exchange for 804*l*. 16*s*. 2*d*. mentioned in the defendant's letter of the 13th of May, 1889. The bill was presented, when due, to the plaintiffs, and paid.

The terra japonica by that ship was landed and weighed at the St. Katherine's Dock. Such landing and weighing commenced on the 24th of September, and *ended on the 7th of October, 1889. The [*646 result appears in a subsequent part of the case.

Before the writing of the letter next hereinafter mentioned, the invoice and bill of lading relating to the shipment by the Elphinstone, had been received by Messrs. Small, Colquhoun, & Co., and had been exchanged by them for the acceptance by the plaintiffs of the bill of exchange for 1865*l*. 0*s*. 8*d*. mentioned in the defendant's letter of the 14th of June, 1889; but the Elphinstone had not then arrived in London. The last-mentioned bill was duly paid at maturity, having been previously discounted by the plaintiffs for Small, Colquhoun, & Co. Both the ship-

ments were received and taken by the plaintiffs under the respective bills of lading.

On the 8th of November, 1839, the plaintiffs addressed the following letter to the defendant's house:—

“London, 8th November, 1839.

“Messrs. Spottiswoode & Conolly, Singapore.

“Gentlemen,—We confirm our last letter, of the 1st instant. The purport of the present is, to communicate to you the result of the shipment *per* the Gilbert Henderson. We are much astonished to find that the parcel invoiced as 420 peculs, and which ought to have given 25 tons, only turned out 22 tons. We cannot but express our astonishment at this result; particularly as our order, of the 14th of January last, for this parcel, was clearly expressed, and our limit given of 18s. *per* ton, *laid down here*. We think that you must have made some mistake in making out your invoice; as, if it were otherwise, our price would have been considerably exceeded; because 22 tons, at 18s., the limit given, make 396*l.*, from which we have to deduct the amount of freight, 115*l.*, leaving 281*l.*, and your draft was for 304*l.* odd, thus leaving a difference *647] against you of *23*l.*, supposing our extreme limit of 18s. to have been paid.

“We hope that the parcel of 150 tons, ordered on the 19th January last, for Messrs. Lefebvre, Vidal, & Co., and Messrs. Fandon & Co., of Havre, which you have shipped *per* the Elphinstone,—your draft for which we have paid,—will not turn out in the same way; because, in that case, we must, on behalf of our said friends, have recourse to you for the difference, as you will have paid more than our limits.

“Yours, &c.,

“C. DEVAUX & Co.”

The ship Elphinstone arrived in London on the 13th of November, 1839. The terra japonica by that ship was landed and weighed in the London Docks. Such landing and weighing commenced on the 21st of November, and ended on the 4th of December, 1839. The result appears in a subsequent part of the case.

On the 6th of December, 1839, the plaintiffs again addressed Messrs. Spottiswoode & Conolly, as follows:—

“London, 6th December, 1839.

“Messrs. Spottiswoode & Conolly, Singapore.

“Gentlemen,—By your letter of the 5th of July, you inform us that you were about shipping the order for 200 tons of terra japonica on board the William Parker, and that you had taken advantage of the authority given you to draw on us in favour of Messrs. Small, Colquhoun, & Co., at sixty days' sight. You did not mention what sum: but those gentlemen presented us a draft for 2500*l.*, which exceeded our credit 500*l.*, and which we offered to accept, upon condition, that, if our order was not executed according to the limits given, they would repay us the amount.

This they declined acceding to. Our object in requesting their guarantee, arose from the circumstance of the parcel of terra *japonica *per* [*648 the Gilbert Henderson, having turned out short. We saw again Messrs. Small, Colquhoun, & Co. a few days afterwards, and then stated to them, that, as the Elphinstone had arrived with the terra japonica invoiced to us for our friends Messrs. Lefebvre, Vidal, & Co., and Fandon & Co., of Havre, they had better let the matter stand over until we had the weights of that parcel, as it would probably guide us as to what we ought to do respecting your draft. We were only able to obtain the weight of the parcel *per* the Elphinstone this day; and we are sorry to inform you that you have not executed our order according to our instructions. By our letter of the 19th of January last, we ordered 150 tons of terra japonica for our two Havre friends, at 18s. *per* ton, *laid down here*, all expenses, insurance, and commission included. In this order, you have invoiced us the parcel by the Elphinstone, the weight turns out to be,—

2188 baskets, net	2685 . 0 . 18
16 bags sweepings	20 . 2 . 10
	<hr/>
	2655 . 3 . 0; or

132 tons, 15 cwt. 3 qrs., instead of 150 tons.

"We have paid your draft to Messrs. Small, Colquhoun, & Co., amounting to 1865*l.* 0*s.* 3*d.* The freight paid by the Elphinstone being 5*l.* *per* ton net, it follows that the cost price to us, supposing our extreme limit to have been paid, ought only to be 18s. *per* cwt., without freight.

132 tons, 15 cwt. 3 qrs. @ 18s. is	£1726 4 9
instead of	1865 0 3, leaving a

balance in our favour of	£138 15 6, which we
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debit you of. We shall thank you to authorize Messrs. Small, Colquhoun, & Co. to pay us the same, as well as *the small balance due to us by the Gilbert Henderson. We do not anticipate any objec- [*649 tion on your part to do so, as we gave you precise orders that we would not pay more than 18s. *per* cwt. *laid down here*; and there is clearly some mistake in the way you have calculated your weights in Singapore; and of course you must bear the consequence of the error. If, however, and contrary to our imagination, you should not think it correct to pay this claim, we shall thank you, as the distance that separates us is so great, to authorize Messrs. Small, Colquhoun, & Co. to appear for you to the action that we shall bring for the same: for, as we shall be obliged to pay our correspondents at Havre, we cannot consent to lose this amount, in a transaction in which our instructions were so clearly defined.

Yours, &c.

C. DEVAUX & Co."

On the 19th of February, 1840, the plaintiffs again addressed the defendant's house at Singapore, as follows:—

“London, 19th February, 1840.

“Messrs. Spottiswoode & Conolly, Singapore.

“Gentlemen,—We hope you will authorize Messrs. Small & Co. to pay us the difference arising from your having exceeded our limits for the parcel of terra japonica *per* the Gilbert Henderson and the Elphinstone. For the latter, we have got into serious difficulty with our friends Messrs. Lefebvre, Vidal, & Co., and Fandon & Co., of Havre. You will keep in mind that our friends understand the price *per* cwt. *laid down here*. You will, consequently, have to calculate accordingly. We have found that your invoices turn out $12\frac{1}{2}$ *per cent.* less than the quantity charged. We are told that that arises from the way you make your *650] purchases of the natives, who do not give you any tare. If, consequently, you pay for the baskets the same price as the terra japonica they contain, that will account immediately for the loss our friends complain of. It is impossible that anything like a loss of $12\frac{1}{2}$ *per cent.* could arise on the voyage. Yours, &c.

“C. DEVAUX & Co.”

In answer to this letter, the defendant's house at Singapore addressed the following letter to the plaintiffs:—

“Singapore, 27th May, 1840.

“Messrs. C. Devaux & Co., London.

“Gentlemen,—We are sorry you refused acceptance of our draft, which was drawn for your interest, and, if our memory serves for the present, we think, by your authority, in so far that we think you stated we might draw on you, if required, to the extent of 2000*l.* or 3000*l.* There was no doubt, however, that, had you accepted the draft, and that we had not ultimately shipped to that extent, our friends, we are satisfied, would never object to refund the amount short shipped. But we are of opinion, from patient perusal of your letters, and those of Messrs. Small, Colquhoun, & Co., on this subject, that it was not the amount we had drawn beyond what you state as our credit, that prevented you, but something connected with the expected result of the terra japonica in weight. Now, you had been informed that the baskets and leaves (or, cagans, as called here,) are weighed as terra japonica; and your orders were always expressly to have it shipped in baskets, with leaves for lining. And we have always complied with these instructions. Your friends could not expect to get packages for nothing: and we are sure you would not expect such from us, without any allowance whatever. In looking *651] over your calculation, we find the loss *by weight* is about $11\frac{1}{2}$ *per cent.*, which we think a very favourable result; and, by making a comparison with other shipments, you will find our statement correct: and, notwithstanding this loss in weight, it appears the terra

japonica stood at 19s. 0½d., at least under 19s. 1d., at or above which you quote the price of the article to be. Under these circumstances, of course, you had the option of receiving the goods, by accepting our draft, or declining the same; and, as the article was laid down at what appears the lowest price quoted, we think you would not have been injured by taking it. As you had not taken it, we must only keep it and do the best we can. We have only further to state that we have used our very best endeavours to meet your wishes; and we feel confident that no person or persons could have done more. And we think, if you make inquiry of other parties who have imported that article, that, generally speaking, the result as to weight will be worse than this shipment under discussion. We cannot, therefore, make any allowance for short weight, under all the circumstances of the case, as there appears to be only 8¼ *per cent.* short, the packages being about 8 *per cent.* Yours, &c.

“SPOTTISWOODE & CONOLLY.”

On the 2d of July, 1840, Messrs.-Spottiswoode & Conolly again addressed the plaintiffs, as follows:—

“Singapore, 2d July, 1840.

“Messrs. C. DEVAUX & Co.

“Gentlemen,—Our last respects was dated the 27th of May; since which time we are in receipt of your esteemed favour of 8th November, 1839, and 19th and 29th of February, and 2d of April, received as follows, viz. 8th of November, received the 18th of June, 19th and 29th of February, on the 28th of May, and 2d of April, on the 22d of June. We observe the loss stated *in your favour of the 8th of November, [*652 on the small shipment of gambier *per* Gilbert Henderson, and note your remarks that you think there may be some mistake. But by this time you will be aware that the loss is usual and customary. This lot appears to have lost about 12 *per cent.* The 19th and 29th of February hand us orders for 200 tons and 150 tons of gambier, at 17s. and 17s. 6d. *per* cwt. We note your remarks on this subject, which shall have our best attention. The 2d April is to countermand the latter order, viz. 150 tons at 17s. 6d. We regret that we had engaged this quantity some time before the arrival of your letter; and, although it is not yet all received, it entirely depends on the party whether they will keep back any part, or compel us to take delivery. The order for 200 tons we cannot execute without a considerable loss to ourselves; and we think you are not desirous that we should lose by this or any other transaction with you. This present order for 150 tons, we undertake to deliver on your terms, although we are certain of not making one farthing of commission by it. But our motive for undertaking this order, was, to show you that we would rather lose our commission than disappoint you; and, at the same time, to acquaint you, that, on all future orders for this article that you may favour us with, it must be distinctly understood that you, or the person for whom you give the order, must allow

for the package beyond the price of the gambier; and the loss by weight in the gambier, we shall take upon ourselves. We are satisfied that no house in Singapore can execute your orders on better conditions than we do: and we have never looked forward to receiving any benefit beyond our commission; and, as you know, we have on all occasions executed these gambier orders under your limit. However, we are fully aware, *653] that, when you expect to receive a certain quantity, you *ought to get that quantity; and on all future occasions, we shall take the risk of loss by weight on ourselves.

“Yours, &c.

“SPOTTISWOODE & CONOLLY.”

On the 20th of October, 1840, the plaintiffs addressed the defendant's house as follows:—

“London, 20th October, 1840.

“Messrs. Spottiswoode & Conolly, Singapore.

“Gentlemen,—We observe, with satisfaction, that you admit, that, in ordering gambier in weight *laid down here*, we ought to have it: and we hope you will authorize your correspondents to pay us the two small amounts we claim on former parcels. *We know that packages are paid as terra in your place*: but, in ordered goods *laid down here*, it cannot be expected that we should pay packages as goods; and you ought to have taken that into calculation, in executing our orders. In future orders, you say you will debit us of the value of the packages. That will be of no consequence to us, provided that the *terra japonica*, packages included, do not exceed the limit we may give you. Yours, &c.

“C. DEVAUX & Co.”

The plaintiffs proved, by the evidence of brokers in London accustomed to the trade, and by particulars of sales of *terra japonica*, that it is the custom to sell and purchase this article in London by *net weight*; that it is sometimes sold as so many tons, and at others as so many baskets; but that, in either case, *net weight* is paid for, the weight of the packages being deducted from the gross weight; and that the cargoes in question were sold by the plaintiffs according to that mode. The loss of weight on the passage, is about $3\frac{1}{2}$ per cent., and 8 per cent. for baskets and leaves.

*654] *The defendant examined witnesses at Singapore, under a commission; who proved, that *terra japonica* is an article of sale and export from Singapore; that it was always exported from Singapore packed in baskets, with an inner covering of kadjang leaves; that this mode of packing was done at Singapore, by the native sellers, but that gambier was likewise imported in the same manner; that it was always bought from the native sellers in baskets and leaves, and the weight of the baskets and leaves was always included with the gambier contained in them; that no tare was ever deducted, and no allowance whatever was made for the baskets and leaves, and that it was imported in the same

manner; that the baskets and leaves were paid for as gambier, and the whole received as gross weight; that the weight of the baskets and leaves was taken as part of the gambier, and paid for as such; that this was the invariable practice prior to 1846; that the gambier in question, when shipped, was packed in baskets and leaves, in the usual way, and was purchased by the defendant in the same manner in which it was afterwards shipped, viz. in baskets and leaves; that the packing in baskets and leaves is mostly done at Singapore; and that gambier is not, in general, brought to Singapore ready packed for exportation.

The two cargoes of terra japonica shipped by the defendant for the plaintiffs by the ships Gilbert Henderson and Elphinstone, at the times of shipment at Singapore, and including the baskets and leaves in which the same were packed, weighed respectively as follows, that is to say,

	Peculs.	Catties.	Tons.
The shipment per Gilbert Henderson, - - - - -	420	11	or 25
That per Elphinstone, - - - - -	2520	58	or 150

The same shipments when landed in London, by the *dock officers, for the plaintiffs, weighed respectively as follows:— [*655

	Tons.	cwts.	qrs.	lbs.
That per Gilbert Henderson, including baskets and leaves, - -	23	18	3	5
without baskets and leaves, - -	22	1	0	11
That per Elphinstone, including baskets and leaves, - -	143	9	3	11
without baskets and leaves, - -	132	15	3	6

Eight *per cent.* is the usual and customary proportion of weight for the baskets and leaves, in packages of terra japonica. The loss of weight was from the usual evaporation during the voyage, and from the drying of the terra japonica during that time. This difference was agreed to be taken at $3\frac{1}{2}$ *per cent.* loss of weight, and 8 *per cent.* for baskets and leaves.

The sum of 162*l.* 11*s.* 8*d.* claimed by the plaintiffs in this action, was composed of 49*l.* 9*s.* for less weight, and 118*l.* 2*s.* 8*d.* for the weight of baskets and leaves.

The question for the opinion of the court was, whether the plaintiffs were entitled to recover in this action for any, and what, sum. Should the court be of opinion in the affirmative, the verdict was to stand for such sum as the court might direct. Should the court be of opinion in the negative, a nonsuit was to be entered.

The case was argued on the 1st of June last.

Barstow (with whom was *Byles*, Serjt.), for the plaintiffs.(a) The

(a) The points marked for argument on the part of the plaintiffs, were,—“1. That, according to the contracts between the parties, as set out in the correspondence, the baskets and leaves were not properly brought into weight as part of the commodity sold: 2. That the defendant was liable, as the party dealing with the plaintiffs,—the defendant being either principal, or an agent who did not disclose his own principal, or agent for the plaintiffs: 3. That the sum paid by the plaintiffs beyond the proper sum, was recoverable under one or other of the counts of the present declaration.”

*656] plaintiffs are clearly entitled to a verdict *for the full amount which they claim. The orders for the gambier transmitted on the 14th and 19th of January, 1839, were conveyed in terms as plain and explicit as could be; they were only to be executed provided the article "could be laid down in London, all charges, commission, insurance, and freight included, at a price not exceeding 18s. *per* cwt. The circumstance of their having paid the bills drawn upon them for the price of the goods,—the deficiency of weight not having at that time been ascertained,—will not, according to the principle laid down in *Kelly v. Solari*, 9 M. & W. 54, prevent the plaintiffs from recovering back the excess in this form of action. The payment was not a voluntary one. This was a partial failure of consideration, which might have been set up as a defence *pro tanto* to an action upon the bills, as between the original parties: Bayley on Bills; (a) Byles on Bills; (b) Story on Bills; (c) or, possibly, the plaintiffs might have set it up in answer to an action for goods sold and delivered, as suggested by PARKE, B., in *Mondel v. Steel*, 8 M. & W. 858. It is clear, that, in the case of a total failure of consideration, although the contract is under seal, the money paid may be recovered back in an action for money had and received: *Grenville v. Da Costa*, Peake's Add. Cas. 113, 1 Sugden's V. & P., 11th edit., p. 257. It was held in that case, that, if A. agrees to sell an estate to B., and is afterwards disabled from doing so, B. may recover back the money deposited, in an action for money had and received, although the contract for the sale be under seal. "Undoubtedly," said Lord KENYON, "the plaintiff might have maintained an action of covenant for the breach of the contract; but he might also, when he *657] *found the defendant rendered incapable of completing it by an order of the Court of Chancery, in a cause in which he was a party, rescind the contract, and bring an action for money had and received, to recover back the purchase-money. The defendant held this money against conscience, and therefore might be compelled to refund it, by an action for money had and received." The cases are numerous where money had and received has been brought to recover back money paid in excess, under ignorance of the fact, or under a species of compulsion: *Jones v. Barkley*, 2 Dougl. 697, *in notes*; *Dew v. Parsons*, 2 B. & Ald. 562; *Waterhouse v. Keen*, 4 B. & C. 200. [CRESSWELL, J. The point was very much discussed here in the case of *Parker v. The Great Western Railway Company*, 7 M. & G. 253, 7 Scott, N. R. 835. The principle upon which these cases were decided will probably not be denied, but only the application of it to the particular circumstances of this case. MAULE, J. No definite sum was payable from the plaintiffs to the defendant. Here has been a failure on the defendant's part to perform part of the contract. How do the plaintiffs ascertain the amount

(a) 6th edit., by Dowdeswell, 501.

(b) 5th edit., 93.

(c) § 187. 2d edit., p. 207.

they are to recover in this action, otherwise than by the same course as they would have done, if they had brought an action for the breach of contract? Is not this, in effect, trying, by an action for money had and received, what damages the plaintiffs are entitled to for a breach of the contract?] The difference is easily susceptible of calculation. [MAULE, J. Can you, out of an express contract to sell 25 tons at a given price, extract an implied contract to sell 22 tons at the same price?] Yes. [MAULE, J. It may be so : but it is not so obvious as to make the cases you cite particularly applicable.] The defendant, professing to perform the contract, sends a quantity short of that ordered *and paid for. [*658 When the plaintiffs receive the goods, they find they are not the quantity they were entitled to receive. Is not money had and received an appropriate remedy to recover back the amount overpaid? [MAULE, J. The plaintiffs might have rejected the goods, and recovered back the whole sum paid. Of that there is no doubt. But they keep them. It may be, under the circumstances, that there is a new implied contract on a *quantum valebant*, giving rise to a right of set-off.] That is the view which was suggested in *Mondel v. Steel*, where PARKE, B., says (8 M. & W. 871): "It must be considered, that, in all these cases of goods sold and delivered with a warranty, and work and labour, as well as the case of goods agreed to be supplied according to a contract, the rule which has been found so convenient is established; and that it is competent for the defendant, in all of those, not to set-off, by a proceeding in the nature of a cross action, the amount of damages which he has sustained by breach of the contract, but simply to defend himself by showing how much less the subject-matter of the action was worth, by reason of the breach of contract; and to the extent that he obtains, or is capable of obtaining, an abatement of the price on that account, he must be considered as having received satisfaction for the breach of the contract, and is precluded from recovering in another action to that extent; but no more." So, in *Cox v. Prentice*, 3 M. & S. 344, where the defendant received from his principal abroad a bar of silver, and took it to the plaintiffs, who melted it, and sent a piece to an assayer to be assayed at the defendant's expense, and paid a price for the bar to the defendant, as for the number of ounces of silver which by the assay it was calculated to contain, which number was *afterwards discovered to exceed the true number,—it was held [*659 that the plaintiff might, after having offered to return the bar, have money had and received against the defendant for the price thus paid to him under a mistake, although the defendant had forwarded his account to his principal, and in it had placed the price received to the credit of his principal. [CRESSWELL, J. There, both parties were agreed as to what should be paid for. Here, a certain quantity of *terra japonica* is shipped at the foreign port, which the defendant claims to be paid for as if the entire bulk were *terra japonica*. The plaintiffs, on the other

hand, insist that they are entitled to deduct a tare for the baskets and leaves in which the commodity is packed.] Lord ELLENBOROUGH, in the case last cited, seems to provide for this very difficulty. "Let us," he says, "put the case of parties agreeing to abide by the weighing of any article at any particular scales, and, in the weighing, an error, not perceived at the time, takes place from some accidental misreckoning of some weight, and the thing is reported of more weight than it really is, and the price is paid thereupon,—would not in that case money had and received be sustainable?" [MAULE, J. No doubt about that: it would be like the purchase of a box of eggs at so much *per* hundred, and, after the buyer has paid for them upon the supposition that the box contained four thousand, he ascertains that there are but three thousand five hundred. That is a very different case from the present. The question here is, whether you can recover back this assumed overcharge, as money had and received, when, in computing the amount, you approach the difficulty of proving under the common count the damages you might be entitled to recover under a special count.] That difficulty, at all events, does not apply to the second order, of the 19th of January, 1839. Under *660] that, the defendant incurred no *obligation to ship the whole 150 tons. [MAULE, J. Possibly you might have had an action upon *that* contract, if you could show that the defendant might have shipped the whole quantity, but neglected to do so.] It may be so. But the plaintiffs are clearly entitled to have *terra japonica* at the price limited, free from loss by evaporation, and free from deduction on account of baskets and leaves.

Bovill (with whom was *Channell*, Serjt.), for the defendants.(a) *661] The question is not, as the argument *on the other side assumes,

(a) The points marked for argument on the part of the defendant, were as follows:

"1. That the plaintiffs' claim, if otherwise well founded, would not support an action of *indebitatus assumpsit* for money had and received, &c., in its present form, against the defendant, who merely acted as commission-agent for the plaintiffs, in purchasing and shipping the merchandise in question:

"2. That the plaintiffs' remedy, if any, should have been by special action, for disobedience of instructions; or, they ought, if their views be correct, to have rejected the shipments altogether:

"3. That there is, in fact, no cause of action whatever against the defendant; he having purchased and shipped the article in the usual way for the plaintiffs, and shipped it on the plaintiffs' account and risk, he is not responsible for the loss of weight from drying and evaporation, which was only the usual and ordinary effect of the voyage; and, with respect to the baskets and leaves, that the article of commerce as purchased at, and exported from Singapore, consists of the entire packages, or gross weight, of gum, baskets and leaves; and that, the purchases and shipments in question having been made, in this instance, of that article, in its usual state, and in the usual way, the defendant is in no way responsible:

"4. That the usage, as to the mode of purchasing at Singapore, and not the usage as to the mode of selling in London, must prevail in this case:

"5. That the plaintiffs' limits were merely as to price, without entailing any other responsibility upon the defendant; and such price to be ascertained by taking the cost price, with the addition of the charges and the freight to Europe:

"6. That the defendant in fact fulfilled his instructions: the weight of the baskets and leaves, and the loss by the voyage, were only what is customary; and that the plaintiffs, having adopted and accepted the shipments, and taken the chance of realizing a profit, are not entitled to maintain this action."

between the two parties contracting as principals. Spottiswoode & Co. were mere commission-agents, employed by the plaintiffs to purchase for them produce in their own names from the native merchants, at prices not exceeding certain given limits. The whole correspondence shows this. [MAULE, J. It is clearly a contract of sale, and not of agency.] Then, the article purchased, according to the usage of Singapore,—which, in the construction of this contract, must prevail,—was, *terra japonica*, as customarily packed, that is, with baskets and leaves. In *Bayliffe v. Butterworth*, 1 Exch. 425, ALDERSON, B., says: “A person who deals in a particular market, must be taken to deal according to the custom of that market; and he who directs another to make a contract at a particular place, must be taken as intending that the contract may be made according to the usage of that place.” That is in accordance with previous decisions in the Queen’s Bench,^(a) and has also been adopted in this court.^(b) The plaintiffs perfectly well knew what was the practice at Singapore,—that the packages were paid for as *terra japonica*, no tare being allowed. If they had so intended, they should, in their instructions to Spottiswoode & Co., have expressly excepted the baskets and leaves. In their letter of the 20th of October, 1840, they write:—“*We know that packages are paid as terra in your place; but, in ordered goods laid down here, it cannot be expected that we should pay packages as goods; and you ought to have taken that into calculation in executing our orders.*” There is nothing upon the face of the special case, to show that Spottiswoode & Co. were cognisant of any difference in this respect between the practice at *Singapore and in this country. Then, is the loss by evaporation during the voyage, [*662 to be taken into the estimate of price? [MAULE, J. I should think so. WILDE, C. J. The plaintiffs bargain for the article “*laid down here, all charges included,*” at 18s. per cwt.] The bill of lading shows that the goods were shipped on account and risk of Devaux & Co.: it gives the gross weight, and makes the goods deliverable on payment of freight at 5*l.* per ton, *net weight*,—assuming that there will be waste on the voyage. Having notice of the custom at Singapore, and of the Singapore weight, and of the price charged, the consignees, nevertheless, choose to take the goods. They ought at once to have repudiated the contract. In *Cornwal v. Wilson*, 1 Vez. sen. 509, the plaintiff, a factor abroad, having exceeded the price limited for a purchase of hemp, the defendant, who objected to the contract, but afterwards re-shipped and disposed of some of it on a new risk, was ordered to account for the whole at the cost price. [CRESSWELL, J. All that that case proves, is, that the merchant here, who thought he was dealing with the goods as factor, was found in truth to have dealt with them as his own goods.] Here, the plaintiffs take the goods as their own: the only complaint they make, is,—our

(a) *Sutton v. Tatham*, 10 Ad. & E. 27, 2 P. & D. 308. And see *Poole v. Stables*, 12 Q. B. 965.

(b) See *Bayley v. Wilkins*, 7 Man. Gr. & S. 886.

limits have been exceeded. Where is the binding contract here? Suppose the plaintiffs had refused to take the goods? [MAULE, J. In that case, Spottiswoode & Co. would in all probability have brought an action against them for goods bargained and sold.] There was no contract. [MAULE, J. There was the order on one side, assented to on the other.]

Money had and received clearly will not lie,—even assuming that the defendant incurred any liability at all for exceeding the limit given by the plaintiffs' orders.

*663] *Barstow*, in reply. There is no pretence for saying that Spottiswoode & Co. were merely agents in the transaction. Assuming that the custom of Singapore as to the weighing of the article in question was known to the plaintiffs, they have equally a right to assume that Spottiswoode & Co. were acquainted with the mode of weighing here. At all events, the plaintiffs were entitled to have, according to the terms of their order, goods "laid down here" at the price named. In their advice of the shipment, Spottiswoode & Co. speak of having shipped so many *tons*. *Cornwall v. Wilson* was a totally different case. There, the agent had exceeded his limits: the principal, finding the hemp had come to a fluctuating market, was trying to play fast and loose; and it was properly held, that, by his mode of dealing with the goods, he had made them his own. Here, there has been a partial failure of consideration. Money had and received is, therefore, the appropriate, and perhaps the only remedy. *Cur. adv. vult.*

CRESSWELL, J., now delivered the judgment of the court.

This was an action of assumpsit for money had and received, money paid, and money found due upon an account stated. The defendant pleaded non assumpsit.

The cause was tried before the lord chief justice, and a verdict was found for the plaintiff, subject to the opinion of the court upon a special case, which stated, in substance, as follows:—

The plaintiff is a merchant in London, trading in connexion with a French mercantile establishment. The defendant is a partner in a mercantile firm at Singapore, trading under the name of Spottiswoode & Conolly.

*664] On the 14th of January, 1839, the plaintiffs, in *London, wrote to the defendants at Singapore, and ordered twenty-five tons of terra japonica, or gambier, in baskets or other suitable packages, "provided it could be laid down, all charges included, at 18s. per cwt.; and, on the 19th, they wrote again, and gave a further order for one hundred and fifty tons, giving the same limit as to price, with authority to execute any part of the order, if the whole could not be obtained,—adding: "For the payment of these orders, we shall arrange with Small, Colquhoun, & Co., to whom you will please forward bill of lading and

policies of insurance." Small, Colquhoun, & Co. were the defendant's agents in London.

On the 13th of May, 1839, the defendant wrote to the plaintiffs, advising that he had shipped in the *Gilbert Henderson* the twenty-five tons of terra japonica ordered in the letter of the 14th of January, and had forwarded to Small, Colquhoun, & Co. a bill of exchange, at six months' sight, for 304*l.* 16*s.* 2*d.*, being the amount of invoice.

On the 14th of June, the defendant wrote again, advising that he had got the one hundred and fifty tons of terra japonica shipped on board the *Elphinstone*, and had forwarded invoice, bill of lading, and a bill of exchange for the amount of 1865*l.*, to Small, Colquhoun, & Co.

Both invoices described the terra japonica as packed in baskets, and weighing a certain number of peculs.

The *Gilbert Henderson* arrived in London on the 13th of September. The terra japonica by that ship was landed and weighed at the St. Katharine's Dock between the 24th of September and the 7th of October. The invoice and bill of lading before mentioned were handed over to the plaintiffs in exchange for their acceptance of the bill for 304*l.* 16*s.* 2*d.*

Before the 8th of November, Small, Colquhoun, & Co. *had received the invoice and bill of lading of the one hundred and [*665 fifty tons, and handed them to the plaintiffs in exchange for their acceptance of the bill for 1865*l.*, which they soon afterwards discounted for Small, Colquhoun, & Co. The *Elphinstone* had not then arrived in London. Both shipments were received and taken by the plaintiffs under the respective bills of lading.

On the 8th of November, 1839, the plaintiffs wrote to the defendant, expressing their surprise that the first parcel invoiced as 420 peculs, which ought to have given twenty-five tons, only turned out twenty-two tons; and that they supposed there must have been some mistake in making out the invoice. The letter proceeded: "We hope that the parcel of one hundred and fifty tons ordered on the 19th of January, which you have shipped *per* the *Elphinstone*, your draft for which we have paid, will not turn out in the same way, because, in that case, we must, on the part of our friends, have recourse to you for the difference, as you will have paid more than our limits."

The *Elphinstone* arrived on the 13th of November. The terra japonica was landed and weighed in the London Docks. The weighing was finished on the 4th of December.

The first parcel of terra japonica, including the baskets and leaves in which it was packed, weighed 23 tons 18 cwt. 3 qrs.; and, without them, 22 tons 1 cwt. The second parcel, including baskets, &c., 143 tons 9 cwt. 3 qrs.; without them, 132 tons 15 cwt. 3 qrs.

On the 6th of December, the plaintiffs wrote to the defendant, demanding 23*l.* as overpaid for the first parcel, and 138*l.* 15*s.* 6*d.* for the second.

The defendant refused to repay it, contending that, of the whole deficiency, which was $11\frac{1}{2}$ per cent., 8 per cent. consisted of the baskets and leaves, which were usually weighed with the terra japonica at Singapore, *666] and the *whole weight paid for as terra japonica, without allowance, and the remaining $8\frac{1}{2}$ per cent. arose from the usual evaporation on the voyage.

Terra japonica is bought in the London market by net weight, after deducting the weight of packages.

On the argument of the case before us, it was contended, for the plaintiffs, that this was a simple case of the partial failure of consideration for the acceptance and payment of two bills of exchange, and that therefore the plaintiffs might recover the excess as money had and received, the plaintiffs not having knowledge, or the means of knowledge, of the real state of facts, when the bills were accepted.

On the other hand, it was contended, that, if any demand at all existed against the defendants, it was for damages sustained by reason of the misconduct of Spottiswoode & Conolly, as agents, in giving more for the terra japonica than the authority given to them warranted; that the plaintiffs had taken the terra japonica at the invoice price, and could not therefore say that the consideration for their acceptances had failed; and that, if they meant to refuse to pay the price at which it was charged, they should have rejected the commodity altogether, or have consented to hold it as factors for the defendant; but that, having taken to it, and dealt with it as owners, they were bound to pay for it at the invoice price,—for which *Cornwal v. Wilson*, 1 Ves. sen. 509, was said to be an authority. It was not disputed that the plaintiffs were entitled to have terra japonica, in execution of their order, and were not bound to take baskets and leaves in lieu of it.

The case, then, stands thus:—The plaintiffs ordered two parcels of terra japonica,—twenty-five tons, and one hundred and fifty tons,—at a *667] certain price. The *defendant sent invoices and bills of lading, which represented that two parcels of those respective weights had been shipped; and, on the faith of those invoices, the plaintiffs accepted bills for the value of the whole quantities said to have been shipped. In fact, the defendant only shipped twenty-three tons and one hundred and thirty-two tons. Those quantities the plaintiffs received and sold, but never consented to take them as a due execution of their orders, or a satisfaction for their acceptances; for, they immediately wrote and claimed a return of the difference.

The only authority relied on in answer to their claim, was, *Cornwal v. Wilson*; but, when examined, it differs essentially from this case. The statement of the case is very short. The defendant, a merchant in London, sent orders to the plaintiffs, merchants in Riga, as his factors, to buy for him some hemp, at a limited price: the plaintiffs exceeded their bounds by the difference of 25*l.* 2*s.* 6*d.*: the hemp coming to England, the

defendant refused the contract, but however disposed of it; the question was, in what manner the defendant should be accountable to the plaintiffs. The lord chancellor, in his judgment, states a variety of facts existing in the case, by which his opinion was influenced; and he did not decide upon the short and simple statement of facts at the commencement of the report. On the contrary, he came to this conclusion;—"The court then, is to say he meant to take them as his own, notwithstanding what he said; and he ought to account with the plaintiffs according to the price they paid."

In the present case, there is nothing to show that the plaintiffs ever meant to take the terra japonica at a price exceeding the limits they had given (for, the defendant represented that he had not exceeded those limits), or to accept the baskets and leaves as a *substitution for [*668 an equal weight of terra japonica. It appears, therefore, to us to be a simple case of failure of consideration; and that the plaintiffs are entitled to recover the excess, as money had and received to their use.

Postea to the plaintiffs.

SMITH v. THE HULL GLASS COMPANY. Nov. 30.

In an action brought against a joint-stock company completely registered under the 7 & 8 Vict. c. 110, for goods ordered by persons in their employ, and supplied for the purposes of the company, and used by them in their works,—it is not necessary for the plaintiff to prove that the persons who gave the orders were authorized by the directors so to do, or that the contract was made pursuant to the provisions of the company's deed of settlement and by-laws.

DEBT, for goods sold and delivered, against the defendants, who were described in the declaration as a joint-stock company completely registered before the accruing of the causes of action.

Pleas, never indebted, payment, and a special plea, which in the result became immaterial.

The cause was tried before CRESSWELL, J., at the first sitting in Michaelmas term, 1848. It appeared that the defendants were a joint-stock company completely registered under the 7 & 8 Vict. c. 110, and that the goods for the price of which the action was brought, had been ordered by the secretary and the working manager of the company, and delivered upon the company's premises, and used by them in the course of their business.

The company's deed of settlement was not produced.

On the part of the defendants, it was insisted, that the plaintiff was bound to show that the persons giving the orders for the goods were authorized by the directors so to do, and that the deed of settlement and by-laws of the company gave the directors authority to bind the *company by contracts for the supply of goods upon credit: and the cases of *Ridley v. The Plymouth, &c., Grinding and Baking* [*C69

Company, and *The Kingsbridge Flour-Mill Co. v. The Plymouth, &c., Grinding and Baking Company*, 2 Exch. 711, were relied on as authorities to show, that, although joint-stock companies completely registered under the 7 & 8 Vict. c. 110, are bound by contracts made by a competent board of directors, though not under seal, or made in compliance with the requisites of the 44th section,—yet that persons seeking to render those companies liable on contracts made with the directors, must show their authority to bind the company, either by the production of the registered deed of settlement, or by proof that the body of shareholders authorized particular individuals to make contracts binding on the company.

The learned judge, acting upon the authority of these cases, directed the jury to find for the defendants.

Talfourd, Serjt., in the course of the same term, obtained a rule nisi for a new trial, on the ground of misdirection. He referred to *Arnold v. The Mayor of Poole*, 4 M. & G. 860, 5 Scott, N. R. 741, and *Paine v. The Strand Union*, 8 Q. B. 326, 15 Law Journ. N. S. Q. B. 211; and he distinguished the cases of *Ridley v. The Plymouth, &c., Grinding and Baking Company*, and *The Kingsbridge Flour-Mill Company v. The Plymouth, &c., Grinding and Baking Company*.

Byles, Serjt., and *Hugh Hill*, in the last term, showed cause. In order to charge a registered joint-stock company with a contract of this sort, it is not enough to show that the goods were ordered by the secretary *670] or other officer of the company, and that they were delivered *to, and used by, the company. This is clearly shown by the cases referred to at the trial. The question arises upon the 7 & 8 Vict. c. 110, which, in its preamble, recites that “it is expedient to make provision for the due registration of joint-stock companies during the formation and subsistence thereof, and also, after such complete registration as is hereinafter mentioned, to invest such companies with the qualities and incidents of corporations, with some modifications, and subject to certain conditions and regulations, and also to prevent the establishment of any companies which shall not be duly constituted and regulated according to the provisions of this act.” By the 7th section, companies within the contemplation of the act are disabled from acting otherwise than provisionally in accordance with the act, until they shall have obtained a certificate of complete registration, in the manner provided for by s. 9; and, to entitle them to obtain such certificate, they are required to register a deed of settlement in the manner, and containing the provisions in s. 7 mentioned. The 18th section provides “that every person shall be at liberty to inspect the returns, deeds, registers, and indexes which shall be made to or kept by the said registrar of joint-stock companies; and that there shall be paid for such inspection such fees as may be appointed by the commissioners of Her Majesty’s treasury in that behalf, not exceeding one shilling for each such inspection; and that

any person shall be at liberty to require a copy or extract of any such return or deed, to be certified by the said registrar; and there shall be paid for such certified copy or extract such fee as the commissioners of Her Majesty's treasury may appoint in that behalf, not exceeding sixpence for each folio of such copy or extract; *and that, in all courts of law and equity, and elsewhere, every such copy or extract so certified shall be received in evidence, without proof of the *signature thereto, or of the seal of office affixed thereto.*" The 25th section shows the effect of complete registration, upon [*671 obtaining which, it is declared that "such company, and the then shareholders therein, and all the succeeding shareholders, whilst shareholders, shall be and are hereby incorporated, as from the date of such certificate, by the name of the company as set forth in the deed of settlement, and for the purpose of carrying on the trade or business for which the company was formed, but only according to the provisions of this act, and of such deed as aforesaid, and for the purpose of suing and being sued, and of taking and enjoying the property and effects of the said company." Contracts entered into by joint-stock companies are regulated by the 44th section, which, "for the purpose of regulating contracts entered into on behalf of any joint-stock company completely registered under this act (except contracts for the purchase of any article the payment or consideration for which doth not exceed the sum of 50*l.*, or for any service the period of which doth not exceed six months, and the consideration for which doth not exceed 50*l.*, and except bills of exchange and promissory notes)," enacts "that every such contract shall be in writing, and signed by two at least of the directors of the company on whose behalf the same shall be entered into, and shall be sealed with the common seal thereof, or signed by some officer of the company on its behalf, to be thereunto expressly authorized by some minute or resolution of the board of directors applying to the particular case; and that, in the absence of such requisites, or of any of them, any such contract shall be void and ineffectual (*except as against the company on whose behalf the same shall have been made*); and that every such contract for the purchase of any article the consideration of which doth not exceed the sum of 50*l.*, or for any services the *period of which doth not exceed six months, and the consideration for which doth not exceed 50*l.*, [*672 entered into on behalf of any joint-stock company completely registered under this act, may be entered into by any officer authorized by a general by-law in that behalf; and that every such contract, whether under seal or not, shall, immediately after the same shall have been entered into, be reported to the secretary or other appointed officer of the company on whose behalf the same shall have been entered into, who shall enter the same in proper books to be kept for that purpose; and that, if any such contract be not so reported and entered, then the officer by whose default such contract shall not be so reported or entered, shall be

liable to repay to the company on whose behalf such contract may be made, the amount of the consideration agreed to be paid by or on behalf of such company in respect of such contract." The contract for the supply of these goods was not shown to have been made in compliance with this provision. The 44th section comprehends *all* contracts. [MAULE, J. Although executed?] The Court of Exchequer so held, in the two cases referred to at the trial. The case of a joint-stock company is somewhat like that of a club, the individual members of which are not responsible for goods furnished by a tradesman, on credit, unless it be shown, either that the party sued was privy to the contract, or that the dealing on credit was in furtherance of the common object and purposes of the club: *Todd v. Emly*, 7 M. & W. 427. The knowledge of one member is not, as in the case of an ordinary trading partnership, the knowledge of the firm. In *Ridley v. The Plymouth, &c., Grinding and Baking Company*, PARKER, B., says: "The 7 & 8 Vict. c. 110, s. 7, provides that there shall be no complete registration of *673] such a joint-stock company, until a copy of their deed of settlement shall have been delivered to the registrar of joint-stock companies. It is, therefore, competent to every person dealing with such a company, to ascertain the objects of the company; for, the deed must specify them, and also who the directors are; and any person may find in that deed the duties of the directors, and their powers as between them and the company. Therefore, every person seeking to bind the company by a contract with the directors, must give some proof of their authority. I perfectly agree that the liability of the company may be shown without producing the original deed, or a copy of it, provided it be shown that all persons who formed the company had sanctioned any particular individuals entering into contracts to bind them: if there were any proof of such authority, no doubt the company would be bound." The learned judge in this case properly ruled in accordance with the decision of the Court of Exchequer in that case.

F. Robinson, in support of the rule. It may be conceded that corporations are usually bound only by contracts which are entered into by them under their corporate seal,—as was held in *Gibson v. The East India Company*, 5 N. C. 262, 7 Scott, 74, *Arnold v. The Mayor of Poole*, 4 M. & G. 880, 5 Scott, N. R. 741, *The Mayor, &c., of Ludlow v. Charlton*, 6 M. & W. 815, and many other cases. But there are many contracts which even corporations may lawfully perform without seal; such as those relating to matters of frequent occurrence or of little importance, or in respect of goods sold to or by them in the course of their business: *Beverley v. The Lincoln Gas Light and Coke Company*, 6 Ad. & E. 829; *Church v. *The Imperial Gas Light and Coke* *674] *Company*, 6 Ad. & E. 846, 3 N. & P. 35. In *Paine v. The Guardians of the Strand Union*, 8 Q. B. 327, it was held that the guardians of a poor-law union cannot bind themselves by an order not

under seal, for making a survey and map (according to the statute 6 & 7 W. 4, c. 96, s. 3) of the rateable property of a parish forming part of the union; such order not being a contract necessarily incident to the purposes for which the guardians are made a corporation, by the 5 & 6 W. 4, c. 69, s. 7, and 5 & 6 Vict. c. 57, s. 16; and it not being intended, by the statute 6 & 7 W. 4, c. 96, s. 3, that the guardians of a union should make themselves liable for the expenses of such plan. But, in the subsequent case of *Sanders v. the Guardians of the St. Neots Union*, 8 Q. B. 810, it was held, that, if work be done for a corporation, for purposes connected with the corporation, under a verbal order, and accepted and adopted by them, they cannot, in an action to recover the price, object that no order was given under seal. The doctrine that corporations may, for some purposes, contract otherwise than under seal, is as old as the Year Books, M. 4 H. 7, fo. 27, pl. 7, and H. 7 H. 7, fo. 9, pl. 2. If that were so when trade was driven at so gentle a pace as it was in those days, how much more necessary is it now to extend the powers of action of these bodies corporate, to meet the exigencies of our more stirring times. [MAULE, J. Nobody denies that this corporation might contract for this purpose without seal: but the question is, whether the evidence showed that the proper persons did in point of fact contract.] There clearly was evidence for the jury; the goods were supplied for and used by, the company in their business. In *Doe d. Pennington v. Taniere*, 18 Law Journ. N. S., Q. B. 49, Lord DENMAN, in *delivering the judgment of the court, says: "To enforce an executory contract upon a corporation, it might be necessary to [*675 show that it was by deed; but, where the corporation have acted as upon an executed contract, it is to be presumed, against them, that everything has been done that was necessary to make it a binding contract upon both parties, they having had all the advantage they would have had if the contract had been regularly made. This is by no means inconsistent with the rule, that, in general, a corporation can only contract by deed: it is merely raising a presumption against them, from their acts, that they have contracted in such a manner as to be binding upon them, whether by deed or otherwise." The 44th section of the 7 & 8 Vict. c. 110, is directory only. And, if there was anything in the company's deed, or in their by-laws, to prevent such a contract as this from being valid, it was incumbent on the defendants to show that.

Cur. adv. vult.

WILDE, C. J., now delivered the judgment of the court.

At common law, one of several partners in a trading concern may bind all by a contract made within the scope of matters relating to the partnership. If the partnership is of many, under whatever firm they trade, and whatever regulations they may make *inter se* for managing and conducting the concern, each partner would still have the same power to bind his co-partners. If, then, a co-partnership consisting of a few active

and many dormant partners had traded under the firm of The Hull Glass Company, the active partners might have bound the rest by contracts made, in the name of the firm, with reference to the co-partnership business. Assume such to have been the constitution of The Hull Glass Company, the present case would have stood *thus:—Some of the partners, who were called directors, managed the concern, the other partners were dormant. The person employed to conduct the operative part of the concern, ordered certain goods, which were delivered on the premises of the co-partners, and consumed there in their business. Is not the accepting and using the goods, some evidence that the party ordering had authority from the managing partners to give the order? It would, therefore, be the same as if given by themselves, and would bind the dormant partners. I am not aware that what is called a joint-stock trading company, if in fact a partnership exist between the shareholders, differs from an ordinary partnership in this respect; and, if that be so, but for the stat. 7 & 8 Vict. c. 110, the plaintiff in this case would have made out a *prima facie* case against the co-partnership. What, then, is the effect of that statute? It enables certain co-partnerships to obtain a certificate of complete registration; and then confers upon them certain powers. But, in order to obtain such certificate, they must comply with several conditions imposed, one of which is, that they must execute a deed containing various matters specified in the act; and such companies are required to appoint not less than three directors for the conduct and superintendence of the execution of the affairs of the company: and, after complete registration, the directors are, by sect. 27, empowered, 1st, To conduct and manage the affairs of the company according to the provisions and subject to the restrictions of that act and of the deed of settlement, and of any by-law, and, for that purpose, to enter into all such contracts and do and execute all such acts and deeds as the circumstances may require. The directors, then, are to conduct and manage the affairs of the company, subject to the restrictions of the deed of settlement, or any by-law: and the first question arising out of that enactment, is, *whether parties contracting with the directors in matters relating to the co-partnership business, are bound, when seeking to enforce their contracts, to show that they, the directors, were authorized by the deed or by-laws to enter into them. It is said that they are so bound, because copies of the deed and the by-laws are to be registered, and may be inspected by any person on payment of a small fee. But it seems to us that the directors, unless restrained by the act of parliament, or the deed, would have all the authority given to partners by the rules of the common law. *Prima facie*, they would, as directors, have that authority. The plaintiff, then, in this case having proved that his goods were supplied to the directors upon their authority, a contract to pay for them would be implied. It may be true that such *prima facie* case might have been rebutted by showing that the directors were restrained

by the deed (the act of parliament imposes no such restraint) from making such contract on behalf of the shareholders. But, if the deed contained no such restraining clause, the authority would exist. And the plaintiff cannot be called upon to prove the negative, viz. that the deed contains no such clause. The defendants, if they rely upon a restriction, should have proved its existence. The effect of the registration of the deed, and by-laws, might be, to affect all parties contracting with the directors with notice of their contents, and, therefore, of any restrictions imposed upon the directors with reference to making contracts: but still the burthen of proving the existence of such restrictions, would lie on the defendants. The case of *Ridley v. The Plymouth Grinding and Baking Company*, 2 Exch. 711, differs essentially from this. The contract sued upon had no relation to the business carried on by [*678] the company, and was not within the scope of any implied authority given for the purpose of managing and conducting that business; and therefore it might be correct to hold that the plaintiff was bound to prove affirmatively that the parties who affected to bind the company by their contract, had been authorized to do so, either by the deed, or in some other mode.

In the next case, *The Kingsbridge Flour Mill Company v. The Plymouth Grinding and Baking Company*, 2 Exch. 718, the deed was in evidence. PARKE, B., seems to rely on the circumstance, that it made the concurrence of five directors necessary to make a valid contract; and that no such concurrence was proved. In the present case, the deed was not in evidence; and, in the absence of the deed, there being nothing in the statute to affect the case, we think there was evidence of a contract by the company, which ought to have been submitted to the jury.

We make no observations upon sect. 44, except that it shows, that, as far as the statute is concerned, no particular form of contract is required, in order to make it available against the company. Rule absolute.

*NICKELS v. ROSS. Nov. 12.

[*679]

In case for the infringement of a patent, the declaration alleged that the plaintiff was the inventor of certain improvements in machinery for covering fibres, applicable in the manufacture of braid and other fabrics; that the Queen had granted him a patent for his invention; and that the defendant infringed it.

The defendant pleaded,—first, *non concessit*,—thirdly, after setting out the specification (which recited that the Queen had granted to the plaintiff a patent for improvements in machinery for covering fibres, applicable to the manufacture of braid and other fabrics, communicated to him by a foreigner residing abroad), that, before the granting of the patent, the plaintiff represented to Her Majesty, that, in consequence of a communication made to him by a certain foreigner, residing abroad, he, the plaintiff, was in possession of an invention of improvements in machinery for covering fibres, applicable in the manufacture of braid and other fabrics; that Her Majesty, believing, and confiding in the truth, and acting upon the suggestion so made by the plaintiff as aforesaid, and in consideration thereof, granted the letters-patent in the

declaration mentioned; and that such representation was false; whereby the letters-patent were null and void,—fifthly, that the alleged invention was not new,—eighthly, that the plaintiff did not by his specification particularly describe the nature of his invention, and in what manner the same was to be performed,—ninthly, that no sufficient specification was enrolled.

At the trial, the plaintiff put in the letters-patent and specification, and gave evidence to show, that a machine like his had never been in use before the date of the letters-patent:—

Held, that this entitled the plaintiff to a verdict upon the issue joined on the first plea.

And *semble*, that the plea of *non concessit* did not impose upon the plaintiff the burthen of showing that the crown had power to grant, until evidence had been given on the other side to impeach the patent; and that the averment in the declaration, that the plaintiff was the inventor of the improvements for which the patent was granted, not having been traversed, the defendant was not at liberty to controvert that fact at the trial.

Held, also, that the plaintiff was entitled to a verdict on the issue joined on the third plea, *without any proof that the invention was communicated to him by a foreigner residing abroad*, as alleged in the petition recited in the specification,—a party availing himself of information from abroad, being an *inventor*, within the meaning of the 21 Jac. 1, c. 3, s. 6.

The specification stated the invention to relate to “certain improvements on, or additions to, the apparatus or parts constituting what are called braiding or plaiting-machines, whereby the inventor was enabled to produce, by such machines, elastic and non-elastic braids, and other fabrics, with elastic or non-elastic strands, yarns, or threads, introduced lengthwise of the fabric, and four or more in the same surface or plane, or mixtures of elastic or non-elastic fibres in combination in the same fabric,—such introduced elastic and non-elastic threads or strands proceeding lengthwise of the fabric produced, and not partaking of the movements of the braiding or plaiting threads or yarns, which, in the progress of working, twist around or over the longitudinal introduced threads, and plait or braid amongst each other.” And, after describing the ordinary braiding-machine,—in which all the threads partake of like movements, and all aid in forming a fabric of plaited threads,—the specification (referring to the annexed drawings) proceeded thus to describe the new process:—“the table *a* moves on a *hollow spindle*, which is *fixed* in the framing of the machine by screw and nut at *b*1: through the tube *b*, the strand or thread of india-rubber, or of cotton, or of other fibrous material, which is to form one of the longitudinal elastic or non-elastic threads of the fabric, passes; the upper part of the tube *b* rising to such a position amongst the braiding threads, that in the evolution of those threads from one selvage to the other of the fabric, they pass under and over (and lie at the back and front of the fabric) each of the longitudinal threads or yarns; hence, the braiding will tie the longitudinal threads into a fabric, the longitudinal threads forming the length of the fabric, and the braiding threads forming the covering (when sufficiently closely worked), and the tie-threads of the fabric.”

The jury found that the plaintiff's machine was new, but that the use of a hollow revolving spindle or tube was *not* new:—Held, that, inasmuch as the plaintiff's claim was for the hollow spindle, not *generally*, but *fixed*, this finding did not negative the novelty of the plaintiff's invention; and therefore that he was entitled to a verdict on the issues joined on the fifth, eighth, and ninth pleas.

THIS was an action for an alleged infringement of a patent for “improvements in machinery for *covering* fibres, applicable in the manufacture of braid and other fabrics.”

*The declaration was in the ordinary form.

*680]

The defendant pleaded,—first, that, Her Majesty did not give and grant unto the plaintiff her special license, full power, sole privilege and authority, that the plaintiff, his executors, &c., or such other persons as he or they should at any time agree with, and no others, from time to time, and at all times, during the said term in the declaration mentioned, should and lawfully might use, exercise, and vend the said supposed invention in the declaration mentioned, in manner and form as in the declaration in that behalf above alleged; concluding to the country.

Secondly,—that theretofore, and before the making of the said letters-

patent in the declaration mentioned, *to wit, on the 21st of April, [*681 1838, our lady the now Queen sent to her then lord high chancellor of Great Britain for the time being Her said Majesty's warrant and writ closed, under her said Majesty's privy seal, directed to Her said Majesty's chancellor, whereby Her said Majesty commanded Her said chancellor, that, under Her great seal of Her united kingdom, then remaining in the said chancellor's custody, he the said chancellor should cause Her said Majesty's letters to be made forth patent, in the form therein and nextly hereinafter mentioned and set forth: That the said warrant and writ of our said Lady the Queen was afterwards, to wit, on the day and year last aforesaid, delivered to Her said Majesty's chancellor, in Her said Majesty's chancery, then, to wit, on the day and year last aforesaid, being at Westminster, in the county of Middlesex: That the day of the said delivery of the said warrant and writ of our said lady the Queen to the said chancellor, in the said chancery as aforesaid, to wit, the 21st of April, 1838, then being the day of the said delivery of the same to the said chancellor in the said chancery as aforesaid, was afterwards, to wit, on the day and year last aforesaid, duly entered of record in the said chancery of our said lady the Queen at Westminster aforesaid; as by the said record thereof still remaining in the said chancery of our said lady the Queen at Westminster aforesaid, will more fully appear: That afterwards, to wit, on the day and year last aforesaid, Her said Majesty's lord chancellor, by virtue and in pursuance of the said warrant and writ of our said lady the Queen, did, under Her said Majesty's said great seal of the said united kingdom, then remaining in his custody, cause Her said Majesty's letters to be made forth patent, in the form in the said warrant and writ mentioned, and which same letters-patent were letters-patent of the tenor and in the form following, that is to say [The letters-patent were here set out *in hæc verba*, the invention being therein *stated to consist of "Improve- [*682 ments in machinery for *recovering* fibres, applicable in the manufacture of braid and other fabrics"]: That the said warrant and writ of our said lady the Queen, and the parchment writing of the said warrant and writ, was afterwards, to wit, on the 29th of March, 1841, by Her said Majesty's then keeper of Her said Majesty's privy seal, and by virtue and in pursuance of Her said Majesty's command, altered, by having the word "recovering" erased from the said writ, and by having the word "covering" inserted in place and in lieu of the said word "recovering:" and the said warrant and writ, and the parchment writing of the said warrant and writ, was afterwards, to wit, on the day and year last aforesaid, by Her said Majesty's said keeper of the said privy seal, and by virtue and in pursuance of Her said Majesty's command, duly sealed with the said privy seal then remaining in his custody: That the said warrant and writ, and the said parchment writing of the said warrant and writ, so altered as aforesaid, and sealed as last aforesaid, then,

to wit, on the day and year last aforesaid, became and was her said Majesty's warrant and writ under her said Majesty's said privy seal, directed to Her said Majesty's then chancellor of Great Britain for the time being, whereby Her said Majesty commanded Her said chancellor, that, under Her said Majesty's great seal of Her said united kingdom, remaining in his custody, the said chancellor should cause Her said Majesty's letters to be made forth patent, in the following form, that is to say [here the letters-patent were again set out, as altered]: That the said last-mentioned warrant and writ of our said lady the Queen was afterwards, to wit, on the 19th of January, 1844, and in the seventh year of Her said Majesty's reign, delivered to Her said Majesty's said chancellor of Great Britain for the time being, in Her said Majesty's Chancery, then, to wit, on the day and year last aforesaid, being at Westminster aforesaid: That the *day of the said delivery of the said last-mentioned warrant *683] and writ of our said lady the Queen to the said chancellor in the said chancery as aforesaid, to wit, the 19th of January, 1844, and in the seventh year of the reign of our said lady the Queen, then being the day of the said delivery of the said last-mentioned warrant and writ to the said chancellor in the said chancery as aforesaid, was afterwards, to wit, on the day and year last aforesaid, duly entered of record in the said chancery of our said lady the Queen at Westminster aforesaid,—as by the said record thereof, still remaining in the said chancery of our said lady the Queen at Westminster aforesaid, will more fully appear: That afterwards, to wit, on the day and year last aforesaid, the said letters-patent in this plea firstly mentioned and set forth, were by the plaintiff restored into Her said Majesty's chancery at Westminster aforesaid, and the said last-mentioned letters-patent were then by the said chancellor, and at the instance and request of the plaintiff, cancelled, by having the said great seal under which the said letters-patent had been so made as aforesaid, cut off and taken from the same letters-patent; and the said letters-patent having been so cancelled as aforesaid, the parchment writing which theretofore had been the parchment writing of the same letters-patent, was then, to wit, on the day and year last aforesaid, in the said chancery at Westminster aforesaid, altered, by having the word "recovering" erased from the said last-mentioned parchment writing, and by having the word "covering" inserted in the said last-mentioned parchment writing in lieu and in place of the said word "recovering:" That, the said last-mentioned parchment writing having been so altered as aforesaid, Her said Majesty's said chancellor, afterwards, to *wit, on the day and year last aforesaid, did cause to be affixed thereto the said great seal, *684] then remaining in his custody, and thereby then, to wit, on the day and year last-aforesaid, under the said great seal, then remaining in his custody, cause to be made forth the supposed letters-patent in the declaration mentioned, as and for and in lieu of the letters-patent to be made upon and by virtue and in pursuance of the said last-mentioned

warrant and writ of our said lady the Queen : And that the said last-mentioned chancellor did cause the said last-mentioned letters-patent to be so made as aforesaid, bearing date a certain day in the same letters-patent mentioned, to wit, the 21st of April, in the first year of the reign of our said lady the Queen, and bearing date on a certain day, to wit, the day and year last aforesaid, long before the day of the delivery of the said last-mentioned warrant and writ to the said chancellor in the said chancery as aforesaid, contrary to the form of the statute in such case made and provided,—whereby, and by reason and means whereof, the said supposed letters-patent, gift and grant of privilege in the declaration mentioned, were and are null and void, and of none effect ; verification.

Thirdly, that the said supposed instrument in writing under the hand and seal of the plaintiff, and enrolled as in the declaration mentioned, was and is a certain specification and instrument in writing, in the words, letters, and figures following, that is to say [setting out the specification] ; and a true copy of which said drawing and of the said letters and figures in the said specification and instrument in writing mentioned, are hereunto annexed : That, before the making of the said supposed letters-patent in the declaration mentioned, to wit, on the 1st of April, 1838, the plaintiff, by his said petition, mentioned in the declaration, and recited in the said supposed letters-patent, did represent and suggest unto Her said Majesty, that, *in consequence of a communication made to him by a certain foreigner resident abroad*, he the plaintiff was in possession of an invention *of improvements in machinery for covering fibres, applicable in the manufacture of braid and other fabrics : That Her said Majesty, believing, and confiding in the truth, and acting and proceeding upon the said application and suggestion so made by the plaintiff as aforesaid, and in pursuance and in consideration thereof, did make the said supposed letters-patent, gift, and grant of privilege in the declaration mentioned : That the said representation and suggestion so made by the plaintiff unto Her said Majesty as aforesaid, was and is false and untrue : And that the plaintiff was not, before or at the time of the making of the said supposed letters-patent, in possession of the said supposed invention, in manner and form as by the said plaintiff so falsely and untruly represented and suggested unto her said Majesty, as aforesaid,—whereby, and by reason and means whereof, the said supposed letters-patent, gift and grant of privilege in the declaration mentioned, were and are null and void, and of none effect ; verification. [*685]

Fourthly, that the said instrument in writing under the hand and seal of the plaintiff, in the declaration mentioned, was and is a certain specification and instrument in writing, in the words, letters, and figures, and of the tenor, and to the effect in the defendant's said third plea above mentioned and set forth : That, before the making of the said supposed letters-patent in the declaration mentioned, to wit, on the 1st of April, 1838, the plaintiff, by his said petition, mentioned in the declaration, and

recited in the said supposed letters-patent, did represent and suggest unto her said Majesty, that the said supposed invention mentioned in the declaration and in the said specification, was an invention of improvements in machinery, for covering fibres, applicable in the manufacture of braid and other fabrics: That Her said Majesty, believing, and confiding in, and *686] also acting and proceeding upon, the said representation and *suggestion of the plaintiff, and in pursuance and in consideration thereof, did make the said supposed letters-patent, gift, and grant of privilege, in the declaration mentioned: And that the said last-mentioned representation and suggestion so made by the plaintiff to Her said Majesty as aforesaid, was false and untrue, and Her said Majesty was thereby misinformed and deceived; and that the said supposed invention was not an invention of improvements in machinery for covering fibres, applicable in the manufacture of braid and other fabrics, in manner and form as by the plaintiff so falsely and untruly represented and suggested unto Her said Majesty as aforesaid,—whereby, and by reason and means whereof, the said supposed letters-patent, gift and grant of privilege, were and are null and void, and of none effect; verification.

Fifthly,—that the said instrument in writing under the hand and seal of the plaintiff, in the declaration mentioned, was and is a specification and instrument in writing, in the words, letters, and figures, and of the tenor, and to the effect, in the said third plea above mentioned and set forth: and that the said supposed invention mentioned in the declaration, and in the said specification, was not, at the time of the making of the said supposed letters-patent, gift and grant of privilege in the declaration mentioned, a new invention as to the public knowledge, use, and exercise thereof within this realm,—whereby, and by reason and means whereof, the said supposed letters-patent, gift and grant of privilege, were and are null and void, and of none effect; verification.

Sixthly,—that the said instrument in writing under the hand and seal of the plaintiff, in the declaration mentioned, was and is a certain specification and instrument in writing, in the words, letters, and figures, and *687] of the tenor, and to the effect, in the defendant's said *third plea above mentioned and set forth; and that the said supposed privilege in the declaration mentioned, was not and is not a privilege of the sole working or making of any manner of manufacture,—whereby, and by reason and means whereof, the said supposed letters-patent, gift and grant of privilege in the declaration mentioned, were and are null and void, and of none effect; verification.

Seventhly,—that the said supposed invention mentioned in the declaration, and in the said specification in the defendant's said third plea set forth, was not, at the time of the making of the said supposed letters-patent, gift and grant of privilege in the declaration mentioned, of any use, benefit, or advantage to the public,—whereby, and by reason and means whereof, the said supposed letters-patent, gift and grant of privilege, were and are null and void, and of none effect; verification.

Eighthly,—that the said instrument in writing under the hand and seal of the plaintiff, in the declaration mentioned, was and is a certain specification and instrument in writing, in the words, letters, and figures, and of the tenor, and to the effect, in the said third plea above mentioned and set forth, and a true copy of the said drawing, and of each of the said letters and figures mentioned in the said specification, is hereunto annexed,—without this that the plaintiff did, by the said instrument in writing under his hand and seal, in the declaration mentioned, particularly describe the nature of the said supposed invention, and in what manner the same was to be performed, in manner and form as the plaintiff had above in the declaration alleged; concluding to the country.

Ninthly,—that the plaintiff did not within six calendar months next and immediately after the date of the said supposed letters-patent in the declaration *mentioned, cause any instrument in writing, under the hand and seal of the plaintiff, particularly describing and [*688 ascertaining the nature of the said supposed invention, and in what manner the same supposed invention was to be performed, to be enrolled in Her said Majesty's said high court of Chancery,—whereby, and by reason and means whereof, theretofore, and before the commencement of this suit, and also before the committing of the said several supposed grievances in the declaration mentioned, and after the expiration of six calendar months next and immediately after the date of the said supposed letters-patent, to wit, on the 22d of October, 1838, the said supposed letters-patent, and the said supposed license, power, privilege, and authority in the declaration mentioned, and all other rights, liberties, privileges, and advantages whatsoever granted by the same supposed letters-patent, utterly ceased, determined, and became void; verification.

Tenthly, not guilty.

The plaintiff joined issue on the first, eighth, and tenth pleas.

To the second, he replied,—that, before the sending of the warrant and writ closed in that plea first mentioned, the plaintiff had, on the 12th of March, 1838, presented the petition in the declaration mentioned, and that Her said Majesty had been then graciously pleased to condescend to his request, and to grant the letters-patent so brought into the court here as aforesaid; that, by a mistake on the part of a clerk in the office of one of Her Majesty's principal secretaries of state, in preparing a certain document, called the Queen's warrant,—being the authority from Her said Majesty to her solicitor-general to prepare a certain other document, called the Queen's bill,—the word "covering," in the title of the plaintiff's invention was written "recovering;" that such mistake was copied *into the said Queen's bill, and into a certain other [*689 document, called the signet bill, and also into the said warrant and writ of privy seal; and that such writ of privy seal, as set out in the defendant's second plea, and containing such mistake, was delivered to the said chancellor on the 21st of April, 1838, and the day of such deli-

very was duly entered of record as in the said plea alleged, and letters-patent were made as in the said plea first alleged; and that, from the time the said writ of privy seal was first delivered to the said chancellor, the same had hitherto remained in Her Majesty's said chancery; that Her Majesty, having been informed of the mistake so made as aforesaid, was graciously pleased, on the 29th of March, 1841, to order that the said Queen's warrant, signet bill, and Queen's bill, should be amended, to agree with Her Majesty's royal intention, and that the word "recovering" should be made "covering," in the said warrant and bills; and the same were on the day aforesaid amended accordingly; the said writ of privy seal was also, on the day and year last aforesaid, by Her said Majesty's then keeper of Her said Majesty's privy seal, by virtue and in pursuance of Her Majesty's command, altered, to agree with the said Queen's bill, signet bill, and Queen's warrant,—which is the alteration mentioned in the said plea; and that, at the time of such alteration, the said writ of privy seal remained in the said chancery, but the keeper of the privy seal held Her Majesty's privy seal,—which was the alleged sealing of the said warrant and writ in that behalf in the said plea mentioned; that such warrant and writ being so, by command of Her Majesty, altered as aforesaid, did remain in Her Majesty's chancery in the form in the said plea mentioned, which was the delivery of such alleged amended writ to the chancellor in the plea mentioned; that such writ *690] having so remained in the said chancery, from the *said 21st of April, 1838, to the 19th of January, 1844, the said chancellor was pleased, on the day and year last aforesaid, to endorse on the said writ, that he had received the same for the purpose of altering the word "recovering," in the said letters-patent, to the word "covering,"—which was the alleged entering of record of the receipt of the said alleged second writ of privy seal in the said plea mentioned; that, thereupon, the said chancellor was pleased, on the day and year last aforesaid, to alter the word "recovering" in the said letters-patent, to the word "covering," to agree with the said writ of privy seal so amended as aforesaid,—which was the alleged making of the letters-patent in the said plea secondly mentioned; that the letters-patent so brought into court by the plaintiff, and then remaining in the court here, were the letters-patent granted to him on the said 21st of April, 1838, and so amended as aforesaid; and that he had brought his action and declared against the defendant for a breach of such letters-patent,—without this that the said letters-patent so granted to the plaintiff were by the said chancery cancelled, and the parchment writing of the same altered into such other letters-patent, as in the second plea alleged, in manner and form as the defendant had above alleged; concluding to the country.

To the third,—that the representation and suggestion so made by the plaintiff to Her Majesty, was not false or untrue, in manner and form as the defendant had above alleged,—concluding to the country.

To the fourth,—that the said representation and suggestion was not false or untrue, in manner and form as the defendant had alleged,—concluding to the country.

To the fifth,—that the invention in the declaration and specification mentioned, was, at the time of the making of the said letters-patent, a new invention as to *the public knowledge, use, and exercise thereof [*691 within this realm,—concluding to the country.

To the sixth,—that the privilege in the declaration mentioned, was and is a privilege of the sole working, &c., of a manufacture,—concluding to the country.

To the seventh,—that the said invention was, at the time of the making of the said letters-patent, of use, &c., to the public,—concluding to the country.

To the ninth,—that the plaintiff did within six calendar months next and immediately after the date of the said letters-patent, cause an instrument in writing, under the hand and seal of him the plaintiff, particularly describing and ascertaining the nature of the said invention, and in what manner the same was to be performed, to be enrolled in Her said Majesty's high court of chancery,—concluding to the country.

To each of these replications the similiter was added.

The cause was tried before WILDE, C. J., at the sittings at Westminster after Hilary term, 1847.

The specification was put in as follows:—

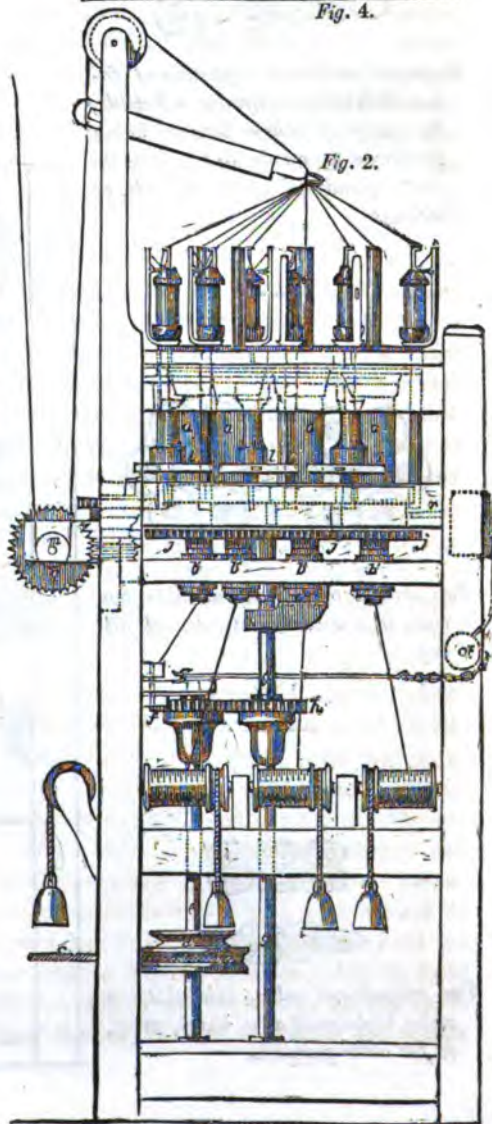
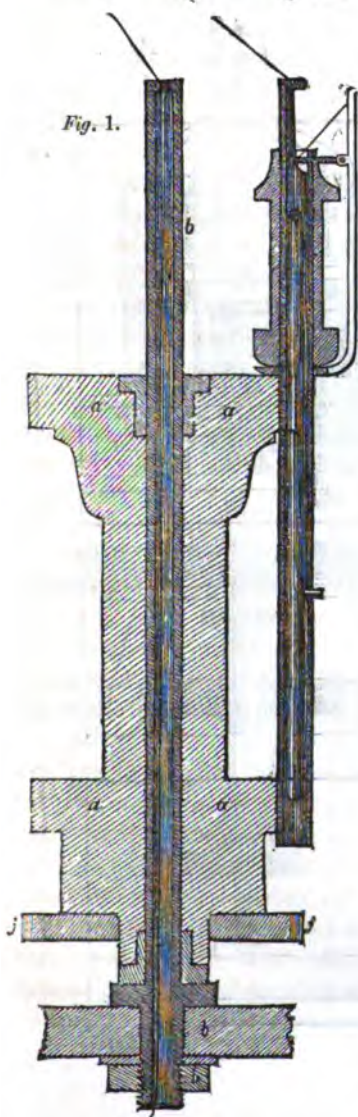
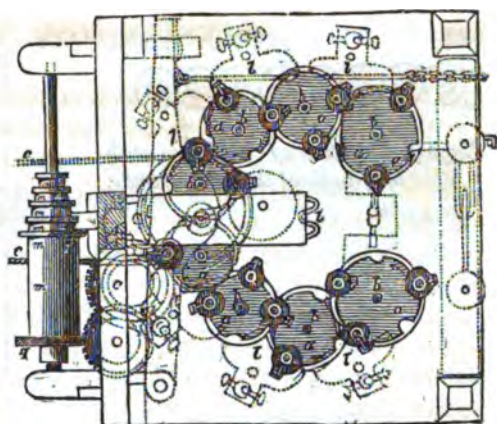
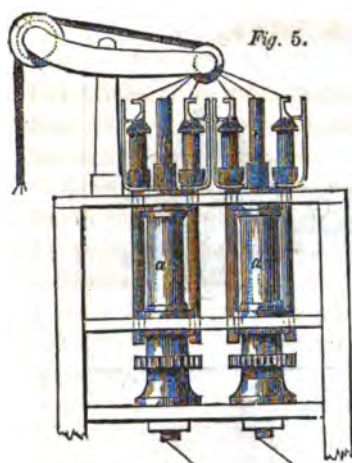
"Now, know ye, that, in compliance with the said proviso, I, the said C. Nickels, do hereby declare the nature of the invention, and the manner in which the same is to be performed, are fully described and ascertained in and by the following statement thereof, reference being had to the drawing hereunto annexed, and to the figures and letters marked thereon, that is to say,—The invention relates to certain improvements on, or additions to, the apparatus or parts constituting what is called braiding or plaiting machines, whereby I am enabled to produce, by such machines, elastic and non-elastic braids, and other fabrics, with elastic or non-elastic strands, yarns, or threads, introduced lengthwise of the fabric, and four or more in the same surface or plane, or mixtures of elastic and non-elastic fibres in combination in the same fabric, such introduced elastic *and non-elastic threads or strands proceeding lengthwise of the fabric produced, and not partaking of the movements of [*692 the braiding or plaiting threads or yarns, which, in the progress of working, twist around or over the longitudinal introduced threads, and plait or braid amongst each other, whereby I am enabled to produce elastic and non-elastic braid, and other plaited fabrics, wherein are contained four or more elastic or non-elastic strands or threads on the same plane, which are covered by the ordinary plaiting or braiding operation of the machinery.

The construction of braiding or plaiting machinery, wherein all the threads partake of like movements, and all aid in forming a fabric of

plaited threads, being well known in the manufacture of braids, it will not be necessary to enter into a long description of the same: all that will be required to make the invention clear, and enable a workman acquainted with such machinery readily to perform my invention, which is only applicable to such machines as work with four or more heads or circular tables for actuating a system or series of bobbins, and consequently capable of introducing four or more elastic or non-elastic, or a combination of elastic and non-elastic, strands or threads in the same plane within the plaited or braided fabrics which the machine would otherwise be capable of producing. It is well known, that, according as the width of the braid, or other plaited fabric, produced by braiding machines, is wider or narrower, so are the number of heads or revolving tables, with their bobbins, employed; the threads from the bobbins being caused to plait or braid with one another by the revolution of the tables or heads (each bobbin, in the course of its working, being actuated by each of the revolving tables or heads), so that, at one moment, each of the threads will, in succession, be at one selvage of the fabric, and progressively *693] traverse across the fabric, in a diagonal direction, to the other selvage of the fabric, and then will traverse back, in an opposite diagonal direction, to the selvage from which it started, and so on across from selvage to selvage,—all which is well understood; and the plaiting or braiding bobbin threads alternately pass under and over the longitudinal threads or strands, thus causing such longitudinal threads to be tied into a fabric; the objects of my invention being,—first, so to arrange and adapt the mechanical parts and the apparatus of braiding machinery, that elastic fabrics may be produced therein with four or more strands or threads of india-rubber in the same plane, introduced as longitudinal threads,—secondly, so to adapt and arrange the mechanical parts and apparatus of braiding-machines, that elastic fabrics may be produced therein with four or more strands or threads of india-rubber, and non-elastic threads, in the same plane, introduced as longitudinal threads,—and thirdly, so to adapt and arrange the mechanical parts and apparatus of braiding-machines, that fabrics may be produced therein with four or more threads or strands of cotton, silk, wire, or other fibrous materials, in the same plane, introduced as longitudinal threads: and, in order to give the best information in my power, I will proceed to describe the drawing hereunto annexed:—

Fig. 1 is a section of a revolving table or head, and of one plaiting or braiding bobbin. *Fig. 2* is a side view of a braiding-machine with eight revolving tables or heads, and seventeen plaiting or bobbins. *Fig. 3* is a front view of the machine. And *fig. 4* is a plan.

In each of these figures, the same letters indicate similar parts. But I will first describe *fig. 1*, which, as before stated, shows one of the revolving tables or heads in section: and, as all the heads shown in *figs. 2, 3, and 4*, are of a similar construction, the description now given will be applicable to all the tables or heads:

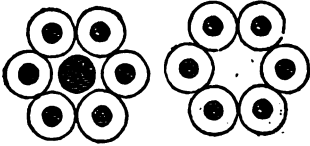




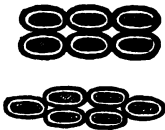
Magnified section of a fabric with eight longitudinal threads, strands, or yarns.



Magnified section of a portion of fabric with three longitudinal threads, the parts of fabric between being produced by revolving heads without longitudinal yarns, threads, or strands.



Two arcular or cylindrical tubes, one with, and one without internal filling.



Two cylindrical tubes, laid flat, in order to be used as a band, strap, or for other purposes.

Fig. 6. 7.

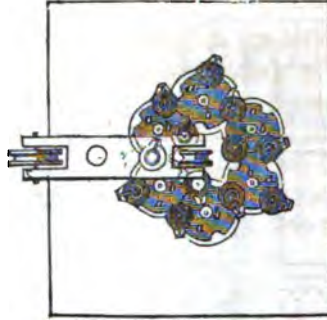
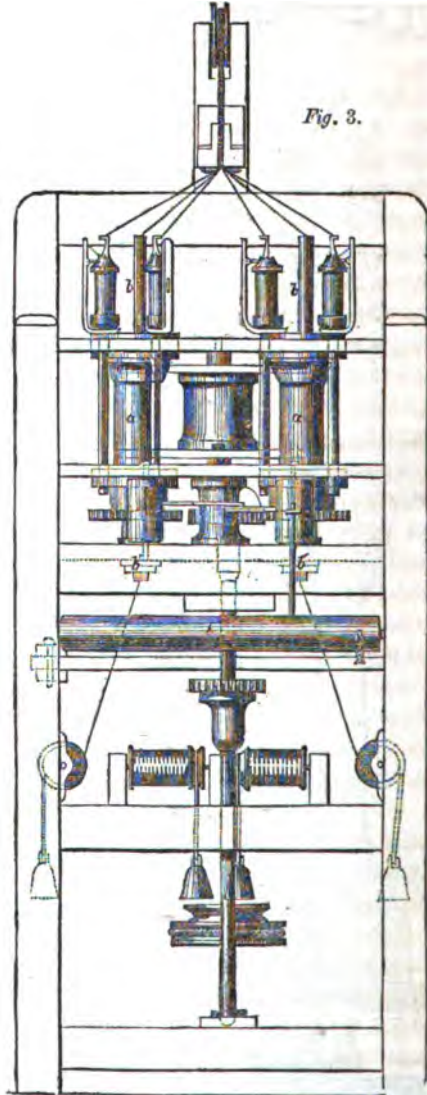


Fig. 3.



*—*a a* is the revolving table, which is of a like construction to those of other braiding-machines, and has notches or recesses [*696 for receiving the pipes or spindles of the plaiting or braiding bobbins; as is clearly shown in the drawing, and as is well understood. The table *a* moves on a hollow spindle *b*, which is fixed in the framing of the machine by screw and nut at *b'*. Through the tube *b*, the strand or thread of india-rubber, or of cotton, or of other fibrous material, which is to form one of the longitudinal elastic or non-elastic threads of the fabric, passes; this, I believe, being the most convenient mode of introducing the longitudinal threads into the fabric; the upper part of the tube *b* rising to such a position amongst the braiding-threads, that, in the evolution of those threads from one selvage to the other of the fabric, they pass under and over (and lie at the back and front of the fabric) each of the longitudinal threads or yarns: hence, the braiding threads will tie the longitudinal threads into a fabric, the longitudinal threads forming the length of the fabric, and the braiding threads forming the covering (when sufficiently closely worked) and the tie threads of the fabric,—the closeness of the covering by the braiding threads depending on the relative speed at which the work is taken up, in comparison with the speed at which the braiding bobbins pass from selvage to selvage of the fabric. And it should be stated, that, although I prefer that the longitudinal threads (from separate bobbins, or from a beam) should pass up through the axis of the revolving tables or heads, it is evident that the longitudinal threads may be placed on the top of the axis, or otherwise above the table, taking care that the longitudinal threads are so conducted up between the braiding or plaiting threads, that such plaiting or braiding threads may pass under and over the longitudinal threads, and in such manner as to lie on the two surfaces of the fabric produced. The axes or pipes *of the braiding or plaiting bobbins are of tubes, as heretofore, in order to allow of means for stopping the machine, [*697 in the event of any of the threads breaking, and, at the same time, keeping the thread at the proper tension at all parts of the revolving tables or heads, as is well understood.

The machine receives motion in the following manner:—*c* is an endless cord or band (driven by a steam-engine, or other power), which drives the pulley *d* on the axis *e*; such axis *e*, by the cog-wheel *f*, gives motion to the axis *g*, by taking into the cog-wheel *h*, which is affixed on the axis *g*. On the upper part of the axis *g* is a cog-wheel *i*, which takes into and drives one of the cog-wheels *j* on the tables or revolving heads. The cog-wheels *j* of the revolving heads gearing one into the other; hence, communicating motion to one, the whole are actuated, and caused to revolve in opposite directions; and, by their revolution, they cause the pipes or spindles of the braiding bobbins to pass from one revolving head to the next, as is well understood,—the lappets *l l* acting as guides to cause the pipes or spindles of the braiding bobbins to pass in the proper

direction; all which is well understood in the making and working braiding-machines. m is the roller for winding up the work: it receives motion from one of the wheels j , which takes into and drives the wheel n . On a vertical axis at the back of the machine, o , is a wheel affixed on the same axis as the wheel n ; and the wheel o takes into and drives the wheel p on another vertical axis at the back of the machine, there being a screw or worm affixed on the axis of the wheel p , which drives the roller m , by taking into the wheel q , as is shown in the drawing. And it will be seen that the roller m will wind up the work faster or slower, according as the surface m^1 , m^2 , m^3 , m^4 , or m^5 , is the surface at any time *698] employed for moving the fabric: and it will be seen *that which-
ever of those surfaces is being used, the speed of the braiding or plaiting bobbins will remain the same; consequently, the fabric produced will have the longitudinal threads more or less closely covered: and the covering of the longitudinal threads may be varied, by working with less braiding threads than there are pipes or spindles for braiding bobbins, that is, using partly empty pipes or spindles, by which an open net covering will be shown on the surfaces of the longitudinal threads, or the fabrics produced thereby.

In the event of any of the braiding threads breaking, the rod m , the hollow pipe or tube which is the axis of that bobbin, will fall, and, when it comes to the front of the machine, will come against the tail of the catch r , and let go the rod s from the roller t , which will allow of the driving axis falling towards the back of the machine, and thus take its cog-wheel out of action,—all which is well understood, and is shown in the drawing.

“Having thus given a description of the machinery, I will proceed to give such information as may be desirable for varying the nature of the fabrics produced in the machine. The machine is capable of including eight threads or strands of india-rubber, which will be worked into and covered by the plaiting of the threads from the braiding bobbins: and it should be understood, that the threads or strands of india-rubber may be uncovered, or covered by any of the known means. The india-rubber threads or strands which are to constitute the longitudinal threads, are to be wound on to bobbins or beams, but, by preference, one bobbin to each thread: and care should be taken that the bobbins should be equally weighted, in order that the strands should all be worked into the fabric with an equal strain. One india-rubber thread is to be passed up *699] the hollow axis of each of the revolving heads or tables: *and such
is to be the case when working with longitudinal threads of silk, cotton, or other suitable fibrous materials. The plaiting or braiding threads, together with the india-rubber threads, are to be collected together, and passed over the wire guide, and then to the roller m , or other means of winding up the work as it is made; the machine being capable of varying the speed of drawing up the work quicker or slower

in comparison with the speed of the evolutions of the bobbins, the closeness or openness of the plaiting may, as heretofore, be regulated.

"In case it be desirable to make a fabric with less quantity of india-rubber threads, yet of the width the eight revolving heads or tables usually produce, in such case, only part of the hollow axes of the tables or heads may be supplied with india-rubber threads, whilst the other hollow axes may remain empty. Thus, any degree of elasticity may be obtained; because the threads from the bobbins where there are no india-rubber threads to the heads or tables, will produce simple plaiting or braiding fabric. And, again, if it be desired to control the elasticity of the fabric produced in the machine, in such case, some of the hollow axes may be supplied with india-rubber, and some with threads of cotton, silk, or other fibrous materials, by which the fabric will have the elasticity of the india-rubber, and, at the same time, that elasticity may be prevented being drawn on beyond that distance from which it will return to its proper length. Thus, with the machine above described, a good fabric may be obtained by supplying the hollow axis of the first revolving table with threads of cotton or other fibre, the second with india-rubber thread, the third with cotton or other fibre, the fourth and fifth with india-rubber thread, the sixth with cotton or other fibrous material, the seventh with india-rubber thread, and the eighth with cotton or other *fibrous materials. I give this merely as an instance; as, the numbers of each of the threads may be varied: but, whatever [*700 be the threads supplied to the revolving heads,—whether elastic or non-elastic,—they will all be laid into the fabrics longitudinally, and in the same plane with each other. Thus may fabrics of different strengths of elasticity be obtained, and also of different weight, depending on the weight of the non-elastic threads, in comparison with the india-rubber threads,—which is important for surgical bands and other purposes: or, other fabrics may be made with all non-elastic threads or fibrous material laid longitudinally on the fabric produced, such threads being wound on suitable bobbins or beams, and applied to the machine as above described.

"When fabrics are plaited by this description of machinery, having india-rubber threads or strands laid in longitudinally, they are to be submitted to heat, by the application of a hot iron, as is well understood in obtaining elasticity to woven fabrics, where they are partly of india-rubber in a stretched state; for, the thread, when being worked into the fabric of a braiding-machine, is in the same condition as is used for weaving purposes, all which is well understood,—which will reduce the length of the fabric produced in the braiding-machine.

"I would here remark that I have only thought it necessary to show one machine for plaiting flat fabrics having eight revolving heads or tables: but it is evident that machines may be made with as few as four revolving heads, and many more than eight: and each revolving table or head have a hollow axis, or other suitable means for longitudinal strands

or threads, as above explained, depending on the nature of the fabric to be produced. I do not, therefore, confine my invention to any particular number of revolving tables *or heads and their bobbins, to this or *701] the circular-machine hereafter mentioned, provided the mechanical parts and apparatus constituting the machine are suitably arranged or adapted for producing fabrics having four or more yarns or strands laid longitudinally into the plaited or braided fabrics, as herein described.

"The drawing shows also parts of another braiding-machine, which differs from that above described; inasmuch as, in the former machine, the bobbins, having passed from one selvage to the other selvage, pass back again; but, in the machine partly shown at figures 5, 6 and 7, the apparatus is so arranged that the bobbins are constantly performing in a circle, and consequently will produce a hollow cylinder of plaited fabric; and, the revolving tables or heads having hollow axes, or other suitable arrangement, may have strands or threads elastic or non-elastic, or a combination of elastic and non-elastic, laid longitudinally into such cylindrical tubes of plaited fabrics, and in the same plane or surface; such machine differing from other braiding or plaiting machines only inasmuch as it is capable of laying such longitudinal threads into the plaited fabric as it is made; and, if it be desired, such tube of plaited fabrics may be worked over a cord, or a quantity of threads, and will then resemble a covering machine of the ordinary kind, excepting inasmuch as it has the capability of introducing the longitudinal threads herein explained.

"The various parts in these figures being marked with the same letters of reference as those employed for the other machine, and as this machine does not otherwise differ from other machines which make circular tubes of plaited fabric, the description above given will be sufficient for the workman. And I would state, that, according to the number of revolving tables and their bobbins, and their strength, and the nature of the yarn or threads used, so may be the fabrics produced in these machines: and the circular machine will *be particularly applicable *702] for making elastic and other cords, ropes, rigger-bands, and such like fabrics, applicable to various useful purposes.

"Having thus described the nature of the invention, and the manner of performing the same, I would have it understood that I make no claim to any of the parts of the apparatus constituting the machine separately, nor combined, so far as the same have been before known and in use. And there may be variations made in the machine, without departing from the nature of the machine, so long as the general adaptation and arrangement of the parts be as herein described."

Evidence was given, on the part of the plaintiff, to show that a machine constructed like his,—with four or more elastic or non-elastic longitudinal threads, so introduced into the fabric, by means of *fixed* hollow spindles, as to allow the plaiting or braiding threads to intertwine amongst them without diverting them from their longitudinal position,—had never

been in use before the date of the letters-patent: but he gave no evidence as to the alleged invention having been communicated to him by a foreigner residing abroad.

Mr. Carpmael was called, on the part of the plaintiff, to explain the nature of the alleged invention; and, the specification having been put into his hands for that purpose, it was objected for the defendant, that, since the case of *Neilson v. Harford*, 8 M. & W. 806, 1 Webster's Patent Cases, 331, 370, where it was held that the construction of the specification is for the court alone, the witness could only be asked to explain technical expressions, or terms of art, like the word "mods" in the will of Nollekins, the sculptor,—being, in truth, a mere translator; and that it was not competent to the plaintiff to examine him as to what was claimed by the specification to be new, and what was admitted to be old. The objection, however, was overruled.

*Several witnesses, machine-makers and others, who were [*703 called on the part of the defendant, deposed to their having, for many years prior to the date of the plaintiff's patent, made or used braiding-machines with from two to twelve hollow *revolving* spindles for the purpose of introducing longitudinal strands or threads into the fabric: and it was insisted, that the specification was ambiguous and obscure, and did not sufficiently distinguish between what was claimed as new and what was admitted to be old; and that the defendant was entitled to a verdict on the first and third issues, the plaintiff having given no evidence to show that the crown had power to grant the letters-patent, or that he had, as alleged in the petition referred to in the third plea, had the invention communicated to him from a foreigner residing abroad.

Four questions were presented by the lord chief justice for the consideration of the jury,—first, whether the hollowness of the spindle was new,—secondly, whether the having the hollow spindle fixed or stationary was new,—thirdly, whether the raising the hollow spindle to a particular point of elevation above the bobbins, was new,—fourthly, whether a combination of all these was new.

The jury found that the use of the hollow spindle was *not* new, but that the using it fixed or stationary, *was* new.

The learned judge inclined to think that the plea of *non concessit* imposed upon the plaintiff the necessity of giving affirmative evidence to show that the crown had power to grant the patent; and that the plaintiff was also bound to give some evidence to show that the statement in his petition to the crown, that the alleged invention had been communicated to him by a foreigner residing abroad, was true: and he accordingly directed a verdict to be entered for the defendant on the first and *third issues, and for the plaintiff on all the rest; reserving leave [*704 to the latter to move to enter the verdict for him on the first and third issues, if the court should be of opinion that his ruling thereon was erroneous,—and to the former leave to move to enter a verdict for

him on the fifth, eighth, and ninth issues, if the court should be of opinion that the specification claimed as new the hollow spindle, whether fixed or revolving, or that the specification did not sufficiently distinguish between what was claimed as new and what was disclaimed as old.

The *Attorney-General*, accordingly, in Easter term, 1847, on behalf of the plaintiff, obtained a rule nisi to enter a verdict for him on the first and third issues. He submitted that *non concessit* does not put in issue the representations upon which the crown is induced to grant the letters-patent, but merely puts the grantee to prove the fact of the grant having been made, and not its legal effect,—citing *Bedells v. Massey*, 7 M. & G. 630, 8 Scott, N. R. 337, and the authorities there referred to; and, as to the third issue, that, the plaintiff having alleged in his declaration that he was the true and first inventor of the improvements for which the patent was granted, and that allegation not having been traversed, the defendant was not at liberty to controvert the fact, and, at all events, that the *onus* of proving the alleged fraud, lay on the party asserting it,—*Doe d. Bridger v. Whitehead*, 8 Ad. & E. 571, 3 N. & P. 557; *Williams v. The East India Company*, 3 East, 192; and that, if the plea amounted to a traverse of the allegation that the plaintiff was the true and first inventor, the evidence given on the part of the plaintiff was sufficient to establish the affirmative,—the importer being an inventor *within the statute 21 Jac. 1 c. 3, s. 6,—*Edgeberry v. Stephens*, 2 Salk. 447, 1 Webster's Patent Case, 35.

M. D. Hill also obtained a rule nisi to enter a verdict for the defendant, on the fifth, eighth, and ninth issues, upon the points reserved at the trial; and also for a new trial, on the ground of the improper reception of evidence to explain the specification, and that the verdict for the plaintiff was against the weight of evidence. He cited *Macfarlane v. Price*, 1 Stark. N. P. C. 199, 1 Webster's Patent Cases, 74, *Harmer v. Playne*, 11 East, 101, *The King v. Cutler*, 1 Stark. N. P. C. 354, and *Savory v. Price*, R. & M. 1.

M. D. Hill and *Hindmarch*, in Trinity term, 1848, showed cause against the plaintiff's rule. *Non concessit* puts in issue the effect of the grant,—whether the Queen was in a position to make, and the grantee to receive it. The authorities upon the subject are few and clear. In Co. Litt. 260, a, it is said, that, “if a grant by letters-patent under the great seal, be pleaded and showed forth, the adverse party cannot plead *nul tiel record*, for that it appears to the court that there *is* such a record; but, inasmuch as it is in nature of a conveyance, the party may deny the operation thereof, therefore he may plead *non concessit*, and prove in evidence that the King had nothing in the thing granted, or the like; and so it was adjudged.” So, in *Hynde's* case, it was resolved by the court, (a) “that it is true that records import in themselves truth, and conclude all men from denying anything appearing within the record, as

(a) 4 Co. Rep. 716.

antedate, &c.(a) But, to take averment which stands with the record, and which doth not *impugn anything apparent within the record, the law doth well admit and allow : as, against a fine upon release, [*706 to say that the conusee had nothing at the time of the fine levied, as it is held in 16 H. 7, 5, b, p. 16 H. 7, fo. 5, b, pl. 2. So against the King's letters-patent under the great seal showed in court, none can deny them ; but *non concessit per præd. literas patentes*, is a good plea, for, although there be such letters-patent, yet perhaps nothing pass by them, and so, *per consequens, non concessit*. And, although enrolment, or other matter of record, shall not be tried *per pais* yet the time when the enrolment was made, shall be tried *per pais* ; for, the enrolment itself shall never be drawn in question (for, that is agreed by both parties), but only the time of it, as, in the other case, where one pleads a grant of the King by his letters-patent under the great seal, and the other pleads *non concessit* by the same letters-patent, in that case the letters-patent are confessed, but the effect and operation of them is denied ; and therefore the trial shall not be where the letters-patent bear date, but where the lands lie ; as it was adjudged." Again, in Eden's case, 6 Co. Rep. 15, b, "in the King's Bench, in trespass *quare clausum fregit apud Martham, in com' Norf.*, by Thomas Eden and William Franklyn, against Edward Brown, the defendant pleaded that the Queen was seised in fee, in right of Her crown, and, by Her letters patent under the great seal, bearing date at Weldhall, *in com, Essex, &c., concessit tenement' præd' in quibus, &c., cuidam A. B., &c.* The plaintiff took issue, *quod non concessit tenement' præd' per prædictas literas patentes*. And this issue was tried in the county of Norfolk, where the land lay, and not where the letters-patent bore date, and the jury found for the plaintiff ; and it was moved in arrest of judgment, that it ought to have been tried where the *letters-patent bore date ; *et non allocatur per curiam* ; for, the [*707 letters-patent being matter of record, and showed to the court under the great seal, cannot be denied, nor can the party plead *nul tiel record* against them, being showed under the great seal ; and therefore the effect of the issue of *non concessit*, is, that the Queen had nothing in the land, or that the tenements did not pass by the letters-patent, in which cases it shall be tried where the land lies : and so it was adjudged." The doctrine laid down in these cases is confirmed by *Baddeley v. Leppingwell*, 3 Burr. 1544, where WILMOT, J., delivering the judgment of the court, says : "*Non concessit* puts the operation of the grant in question. If a man pleads a grant from the crown under the great seal ; and the other pleads *non concessit* ; in this case, the letters-patent are confessed ; but the effect and operation of them is denied : the effect of that issue of *non concessit*, is, that the crown *had nothing* in the land, or that the tenements *did not pass* by the letters-patent. So is Hynde's case, in 4

(a) Citing 37 H. 6, 21, b (Quartermain's case, 37 H. 6, fo. 21, b, pl. 9), Plowd. Com. 491, 8 & 9 Eliz., Dyer, 242 (Whiteacres v. Thurland).

Co. 71 b, and Eden's case, in 6 Co. 15 b, expressly." That case is precisely in point. [MAULE, J. Suppose the crown, being seised of land, granted it in apt terms, but upon a false suggestion,—could you give evidence of that false suggestion under *non concessit*?] The cases above cited show that that may be done. [MAULE, J. Eden's case and Baddeley v. Leppingwell certainly do not, either of them, establish that point. In the case of Alton Woods, 1 Co. Rep. 40 b, there is much discussion as to the effect of false recitals in the King's grant.] *Non concessit* puts in issue all that the plaintiff was before the new rules of pleading bound to prove under the general issue: and its effect is not *708] narrowed by the allegation in the declaration that the *plaintiff was the true and first inventor. It is not essential, though usual, so to aver.

The third plea sets out the specification and the petition upon which the patent was founded. The petition itself was in evidence. It purported to ground the plaintiff's claim to the exclusive privilege he sought, upon the fact of his having obtained the information from a foreigner residing abroad. The plea, it is true, does not allege that the plaintiff acted wilfully and corruptly. The question is, upon which party rests the burthen of proof. The rule of law referred to by Lord ELLENBOROUGH in *Williams v. The East India Company*, 3 East, 199,—that, "where any act is required to be done on the one part, so that the party neglecting it would be guilty of a criminal neglect of duty in not having done it, the law presumes the affirmative, and throws the burthen of proving the contrary, that is, in such case, of proving a negative, on the other side,"—has no application here. *Prima facie*, all monopolies are void. The statute 21 Jac. 1, c. 3, s. 1, is merely declaratory of the common law: but the 6th section declares and enacts "that any declaration before mentioned, shall not extend to any letters-patent, and grants of privilege for the term of fourteen years, or under, hereafter to be made, of the sole working or making of any manner of new manufactures within this realm, to the *true and first inventor* and inventors of such manufactures, which others, at the time of making such letters-patent and grants shall not use, so as also they be not contrary to the law, nor mischievous to the state, by raising prices of commodities at home, or hurt of trade, or generally inconvenient." It is for a party who seeks to establish a monopoly, to bring his case within the exception, and not for the party opposing it to show the contrary. *709] *From the time of Lord HARDWICKE, downwards, the usual course, in the case of an infringement of a patent right, where an application has been made to a court of equity for an injunction, has been, to refuse the injunction, unless the right has been established in a court of law: *Blanchard v. Hill*, 2 Atk. 484; *Bacon v. Spottiswoode*, 1 Beavan, 382; *Cartwright v. Amatt*, 2 B. & P. 43; *Harmer v. Plane*, 14 Ves. 130, 136. The principle laid down in these cases, is, that a patent is a bargain between the public on the one side and the patentee

on the other ; and that care must be taken that the public gets the consideration for the grant, and that the patentee is a person from whom the consideration moves. The statute requires that the patentee shall be the true and first inventor. What do these words mean? Prior to the statute 21 Jac. 1, c. 8, an importer was held to be an inventor : The case of *Monopolies (Darcy v. Allin)*, 11 Co. Rep. 84, Noy, 178, 1 Webster's Patent Cases, 1, 5. In the case of *The Clothworkers of Ipswich, Godbolt*, 351, p. 252, it was resolved by the court, that, "if a man hath brought in a new invention and a new trade within the kingdom, in peril of his life, and consumption of his estate or stock, &c., or, if a man hath made a new discovery of anything ; in such cases, the King, of his grace and favour, in recompense of his costs and travail, may grant by charter unto him, that he only shall use such a trade or trafique for a certain time, because at first the people of the kingdom are ignorant, and have not the knowledge or skill to use it." So, in Sheppard's Abridgment,^(a) it is said that "it is generally held by the judges that the King may, for a *reasonable time, grant a monopoly patent of that which any [*710 man, at his own charge, wit, and invention, shall bring in as a new trade or device into the realm ; or any new engine, tending to the furtherance of it, for the good of the realm." *Edgeberry v. Stephens*, 2 Salk. 447, 1 Webster's Patent Cases, 85, and other cases^(b) have decided that an invention the knowledge of which is imported from abroad, may be the subject of a patent : but that is the only exception which has ever been made out of the words of the statute ; it has never been held that a communication received from a person residing abroad, such person not being a foreigner, will sustain a patent. In *Tennant's case*, *Davies's Patent Cases*, 429, 1 Webster, 125, a patent founded upon a communication made to the patentee by a Scotchman residing in Glasgow, was held void. [COLTMAN, J. Do you contend that a communication made to the party by an Englishman residing abroad, would not be sufficient to entitle him to the patent?] There is no case in which that has been decided. But the statement invariably is, that the information was received from a foreigner residing abroad. [WILDE, C. J. The circumstance of the party's importing a new manufacture, and giving the public of this country the benefit of it, is the basis of the grant of a temporary monopoly to him. I am not aware that it has ever been considered necessary that the informant should be a foreigner.] If the patentee has obtained the grant from the crown by means of a representation which is untrue, the patent is void. In *Morgan v. Seaward*, 2 M. & W. 544, 561, 1 Webster's Patent Cases, 187, PARKER, B., says : "That a false suggestion of the grantee avoids an ordinary grant of lands or tenements from the crown, is a maxim of the common law : and such a grant is void, not

(a) Part III. p. 61, *Prerogative of the King*, pl. 2 ; citing Hughes's Abridgment, 254, Godb. 253.

(b) See *Lombe's Patent*, 1 Webster's Patent Cases, 38.

against the *crown merely, but in a suit against a third person: *711] *Travell v. Carteret*, 3 Lev. 184; *Alcock v. Cooke*, 5 Bingh. 840, 2 M. & P. 625. It is on the same principle that a patent for two or more inventions, when one is not new, is void altogether,—as was held in *Hill v. Thompson*, 8 Taunt. 875, 2 J. B. Moore, 424, and *Brunton v. Hawkes*, 4 B. & Ald. 541: for, although the statute invalidates a patent for want of novelty, and, consequently, by force of the statute, the patent would be void, so far as related to that which was old, yet the principle on which the patent has been held to be void altogether, is, that the consideration for the grant is the novelty of all, and the consideration failing, or in other words, the crown being deceived in its grant, the patent is void, and no action maintainable upon it.” The patentee must be either the inventor, properly so called, or the importer of the invention. In this case, the plaintiff in his petition alleges himself to be an importer. That surely must be a material suggestion. The fact of his making the application in that form shows that he was not the true and first inventor in any other way. The statement in the petition is in the nature of a warranty, the truth of which must be proved by the party making it, and any fraud or concealment in which avoids the transaction: *Geach v. Ingall*, 14 M. & W. 95, *Ashby v. Bates*, 15 M. & W. 589. The rules of evidence are rules which bend to the necessity of the case. It is impossible for the defendant to prove that the plaintiff did *not* receive the information from a foreigner residing abroad. [WILDE, C. J. Suppose you had pleaded that the plaintiff was not the true and first inventor,—must you not have proved the negative? Would your plea have imposed upon the plaintiff the necessity of proving the affirmative? Is there any case where a

*712] patentee *has proved himself to be the true and first inventor, by showing that he obtained his knowledge of the invention by communication from a foreigner residing abroad?] There is not. The grant can have no operation against us, except in so far as the grantee is able to substantiate his title. It is suggested in *Bowman v. Taylor*, 2 Ad. & E. 278, 4 N. & M. 264, by analogy to the case of landlord and tenant, that a licensee cannot dispute the title of the patentee: but in *Hayne v. Maltby*, 3 T. R. 438, where A., asserting that he had a right to a patent machine, covenanted with B. that he should use it in a particular manner, in consideration of which B. covenanted that he would not use any other; in an action by A. on the covenant, it was held that B. was not estopped by his covenant from pleading in bar to the action, that the invention was not new, or that the patentee was not the inventor, but that he might thus show that the patent was void. [MAULE, J. That case is rather hard of digestion.] It has never yet been rejected; and it is sustained by *Chanter v. Leese*, 4 M. & W. 295, S. C. in error, 5 M. & W. 698. The decision of this court in *Beard v. Egerton*, 3 Man. Gr. & S. 97, does not militate against the doctrine here contended for: the plea there was held bad because it negatived only one of the modes in which the plain-

tiff might have been the true and first inventor. Here, however, it is submitted that the plea is a material one, and that it lay upon the plaintiff to prove the truth of the representation made in his petition,—that representation being the very gist of his title. [COLTMAN, J. It is not every false recital in a patent that will render it void.] Certainly not. [COLTMAN, J. The question is, whether you show enough, upon the face of your plea, to make it available as an answer. The foundation of the grant is not the communication *from abroad, but the first publication of the invention here.] There is a direct averment here [*718 that this statement in the plaintiff's petition was the consideration for the grant, and its truth is put in issue. It is the constant course, at nisi prius, to call upon the patentee in the first instance to support his title. In *Dickson v. Evans*, 6 T. R. 57, ASHHURST, J., says: "It is a general rule of evidence, that, in every case, the *onus probandi* lies on the person who wishes to support his case by a particular fact, and of which he is supposed to be cognisant." So, here, it is submitted that it is for the plaintiff to bring himself within the exception in the 6th section of the statute 21 Jac. 1, c. 8.

The *Attorney-General*, *Mellor*, and *Corrie*, in support of the rule. Since the cases of *Nickels v. The London Caoutchouc Company*, 1 Webster's Patent Cases, 656, *Bedells v. Massey*, 7 M. & G. 630, 8 Scott, N. R. 387, and *Bunnett v. Smith*, 18 M. & W. 552, it cannot be doubted that *non concessit* is a good plea; although what is put in issue by it, may be matter of some doubt. [CRESSWELL, J. It seems to be universally assumed that it puts in issue all the surrounding circumstances of the grant. MAULE, J. The provision requiring notice of objections (5 & 6 W. 4, c. 88, s. 5) gives force to that argument; for, unless *non concessit* does put all in issue, the legislature did something which was very idle and superfluous,—which is hardly to be presumed. CRESSWELL, J. That statute was not passed until after the promulgation of the new rules of Hilary term, 4 W. 4, though the bill was introduced in the session before.] The new rules in case are the same as in assumpsit: and the 3d rule in assumpsit *provides, that "all matters in confession and avoidance, including not only those by way of discharge, but those [*714 which show the transaction to be either void or voidable in point of law, on the ground of fraud, or otherwise, shall be specially pleaded." Here, the suggestion is, that there was fraud or misrepresentation in the application to the crown: that should have been pleaded specially. [COLTMAN, J. The plea with which you are now dealing is not a plea in confession and avoidance, but a traverse.] The defendant is, in effect, seeking, under a traverse, to avail himself of matter in confession and avoidance. [CRESSWELL, J. You say, that before the new rules, the evidence in question would have been inadmissible under *non concessit*: but that the effect of the rules, is, to exclude it?] Precisely so. [MAULE, J. It seems to me to be against the spirit of the new rules, that the fact of the

Queen having been deceived in her grant, should be given in evidence under *non concessit*: but it may be (and I incline to think it is so) that the spirit is not embodied in the language of any of the new rules.] Assuming that to be so, is the plaintiff bound to prove the truth of his representation? That would be contrary to every principle upon which the law of evidence is founded.

Upon the third issue, the case of *Beard v. Egerton*, 3 Man., Gr. & S. 97, has an important bearing. The first introducer of a new manufacture into the kingdom, is an inventor within the statute of James. So far as regards the consideration upon which the Queen's grant is founded, it is perfectly immaterial whether the patentee is an actual or only a special inventor. The statute points to no such distinction. The real consideration for the grant of the patent, is, the benefit to the public; and, no doubt, if the crown were deceived in that respect, the grant *would *715] be void: Sir Robert Johnson's case, 17 Vin. Abr. 151, title *Prerogative of the King* (M. c. pl.) 1. In Hindmarch on Patents, page 448, it is said, that, "if the patentee was not an actual inventor, but merely an importer of the invention from abroad, the plaintiff would, under an issue upon a plea alleging that the patentee was not the true and first inventor, make a *prima facie* case, in precisely the same way as has already been mentioned, viz. by putting the patent and specification in evidence, and proving the novelty of the invention at the date of the patent. Under this issue, the defendant may show that the patentee was not the true or actual inventor, and also that he was not the first inventor, —which means, *the first person to give the public the benefit of the invention.*" A party who seeks to avoid a grant of the crown, on the ground of fraud, must prove the fraud. It is an universal principle of justice, that all things are presumed to be rightly done, until the contrary is shown.

The *Attorney-General*, *Mellor*, and *Corrie*, now showed cause against the defendant's rule. The only question upon the fifth issue, is, whether there was evidence to show that the invention for which the patent was granted, was new: and, as to that, there clearly is no ground for finding fault with the conclusion to which the jury came. All that was proved by the defendant's witnesses, amounted to some abortive experiments, which clearly do not affect a subsequently granted patent: *Cornish v. Keene*, 1 Webster's Patent Cases, 501, 3 N. C. 570, 588, 4 Scott, 337.

Then, as to the eighth and ninth issues, reading the specification with a spirit of fairness, it clearly describes the invention with accuracy. The subject of the construction of specifications was much discussed in *Russell v. Cowley*, 1 C. M. & R. 864, where *PARKER, B.*, says, that, *716] "in the construction of a patent, the court is bound to read the specification so as to support it, if it can fairly be done." The same doctrine is laid down by Lord *ELLENBOROUGH* in *Harmar v. Playne*, 11

East, 101.(a) And in *M'Alpine v. Mangnall*, 3 Man., Gr. & S. 496, 518, PARKE, B., says: "The beginning and the end of the specification, it is true, rather bear the aspect of claiming the machinery for the whole process. But, taking the specification altogether, and giving its words a fair and reasonable interpretation, it seems to be obvious that the patentees only claim as their invention those improvements on the old machine that give the vibrating motion to the fabric while in the course of drying." [WILDE, C. J., referred to *Elliott v. Turner*, 2 Man., Gr. & S. 446, where it was held that the words of a specification are to be construed according to their ordinary and proper meaning, unless it be shown by something in the context (which may be explained by evidence), that a different construction ought to be adopted.]

Hindmarch, in support of his rule. The enrolment of a specification is required as a condition of the grant: *Muntz v. Foster*, 6 M. & G. 784, 7 Scott, N. R. 471, 1 D. & L. 737. Has the patentee in this case fairly and properly complied with that condition? He is particularly to ascertain and describe,—first, the nature of the invention,—secondly, the manner in which it is to be carried into effect: and this information must be conveyed in terms sufficiently clear and precise to inform a workman of ordinary skill to what it does and to what it does not extend. It is expedient to repress the growing tendency to laxity of *description in these instruments. "The patentee," says Lord ELLENBOROUGH, in *Macfarlane v. Price*, 1 Starkie, N. P. C. 199, [*717 1 Webster's Patent Cases, 74, "in his specification, ought to inform the person who consults it, what is new, and what is old. He should say, my improvement consists in this,—describing it by words, if he can, or, if not, by reference to figures. But, here, the improvement is neither described in words, nor by figures; and it would not be in the wit of man, unless he were previously acquainted with the construction of the instrument, to say what was new and what was old. The specification states that the improved instrument is made in manner following: this is not true; since the description comprises that which is old, as well as that which is new. Then, it is said, that the patentee may put in aid the figures: but, how can it be collected from the whole of these, in what the improvement consists? A person ought to be warned by the specification against the use of the particular invention: but it would exceed the wit of man to discover from what he is warned in a case like this." So, here, unless extraneous circumstances are called in aid to construe this specification, it is absolutely beyond the power of any human being, to understand it. In the construction of a specification, the rights of the public are to be regarded. *Minter v. Mower*, 6 Ad. & E. 735, 1 N. & P. 595, is on all fours with the present case: there, the specification described the invention to be of "an improvement in the construction, making, or manufacturing of chairs," and to consist in the application of a self-ad-

(a) And see *Harmer v. Plaine*, 14 Ves. 120.

justing leverage to the back and seat of a chair, whereby the weight on the seat acted as a counter-balance to the pressure against the back, and whereby a person sitting in the chair, might, by pressing against the back, cause it to take any inclination, and yet might be supported. In

*718] *an action for infringing the patent, it was pleaded that the plaintiff was not the inventor, and that the specification did not describe the invention : and it was proved that a chair had previously been sold, to which a similar leverage was applied, acting by the pressure in the same way, but having also other machinery, which prevented the inclination of the back from being shifted, except when a spring was touched by the hand. The jury found, that, without such other machinery, the chair previously sold would have produced an equilibrium by the self-adjusting leverage ; that the maker of it was the inventor of the machine, and found out the principle, but not the practical purpose to which it was now applied ; and that the plaintiff had discovered such purpose. And the court ordered a nonsuit. In *Kay v. Marshall*, 5 N. C. 492, 7 Scott, 548, a patent was taken out for "new and improved machinery for preparing and spinning flax, hemp, and other fibrous substances, by power;" and by the specification the invention was declared to consist of "*new machinery for macerating flax* and other similar fibrous substances, previous to drawing and spinning it; and also of *improved machinery for spinning the same* after having been so prepared." The only alleged improvement in the spinning machinery was declared to be "placing the drawing-rollers only two inches and a half from the retaining-rollers," which was nearer than they had ever before been placed for the purpose of spinning *flax*. It appeared, however, that spinning-machines were always so constructed, as, by means of slides, to allow the distance of the rollers to be varied according to the staple or fibre of the article to be spun ; and that *cotton* had always been spun with a reach of less than two inches and a half. It was held that this was not the proper subject

*719] of a *patent, though the jury found that the invention was both new and useful ; and, consequently, that the specification, being void as to part, was void altogether. In *Hill, v. Thompson*, 8 Meriv. 629, 1 Webster's Patent Cases, 229, upon a motion to revive an injunction after a trial of the right at law, Lord ELDON said : "In his directions to the jury, the judge has stated it as the law on the subject of patents,—first, that the invention must be novel,—secondly, that it must be useful,—and, thirdly, that the specification must be intelligible. I will go further, and say, that not only must the invention be novel and useful, and the specification intelligible, but also that the specification must not attempt to cover more than that which, being both matter of actual discovery, and of useful discovery, is the only proper subject for the protection of a patent. And I am compelled to add, that, if a patentee seeks by his specification any more than he is strictly entitled to, his patent is

thereby rendered ineffectual, even to the extent to which he would be otherwise fairly entitled." Here, the specification is clearly bad, for not distinguishing between what is old, and what new.

The verdict upon these issues was clearly against the evidence; indeed, it may be called perverse, for the evidence was all one way. In *Carpenter v. Smith*, 1 Webster's Patent Cases, 530, 540, a single instance of prior user was held to be sufficient to destroy the patent. [MAULE, J. To sustain the verdict, I suppose?] It was so. In the *Househill Coal and Iron Company, app., Neilson, resp.*, 1 Webster's Patent Cases, 673, 709,—which was an appeal from a judgment of the Court of Session in Scotland, disallowing a bill of exceptions,—Lord LYNDEHURST, C., says: "I understand the position of the *learned judge to be this,—that, if the machine had been made, and had been put in trial, unless [*720 those trials had gone on, and the machines had been used up to the time of the granting of the letters patent, it would not be evidence of prior use, so as to invalidate the letters-patent. Now, I am obliged to say,—with all deference to the learned judge, and with all respect to the learned judges of the Court of Session,—that I think in that respect they are mistaken; and that, if it is proved distinctly that a machine of the same kind was in existence, and was in public use, that is, if use or if trials had been made of it in the eye and in the presence of the public, it is not necessary that it should come down to the time when the patent was granted. If it was discontinued, still that is sufficient evidence in support of the prior use, so as to invalidate the letters-patent." The only novelty here was the *raising* the hollow spindle, and the fixing it with a screw and nut,—the hollow spindle itself being old, but not appearing to have been *fixed* before.

Cur. adv. vult.

WILDE, C. J., now delivered the judgment of the court.

This was an action for the infringement of a patent. The declaration alleged that the plaintiff was the inventor of certain improvements in machinery for covering fibres, applicable in the manufacture of braid and other fabrics; that Her Majesty had granted him a patent for his invention; and that the defendant infringed it.

The defendant pleaded several pleas: first *non concessit*,—secondly, a plea that need not be considered,—thirdly, after setting out the specification, which recited that the queen had granted to the plaintiff a patent for improvements in machinery for covering *fibres, applicable to the manufacture of braid and other fabrics, communicated to him [*721 by a certain foreigner residing abroad, the plea averred, that, before the granting of the patent, the plaintiff, representing to Her Majesty, that, in consequence of a communication made to him by a certain foreigner residing abroad, he the plaintiff was in possession of an invention of improvements in machinery for covering fibres, applicable in the manufacture of braids and other fabrics; that Her Majesty, believing and con-

fiding in the truth of, and acting upon, the suggestion so made by the plaintiff as aforesaid, and in consideration thereof, granted the letters-patent in the declaration mentioned, and that such representation was false, whereby the said letters-patent were and are null and void; concluding with a verification,—fourthly, that the alleged invention was not an improvement,—fifthly, that it was not new,—sixthly, that it was not a manufacture within the meaning of the statute,—seventhly, that it was of no use,—eighthly, that the plaintiff did not by his specification particularly describe the nature of his invention, and in what manner the same was to be performed,—ninthly, that no sufficient specification was enrolled,—tenthly, not guilty.

The cause was tried before me, at the sittings in London after Hilary term, 1847, when a verdict was found for the plaintiff on all the issues but the first and third; but leave was reserved to him to move to enter a verdict in his favour on those issues; and the defendant had the like leave as to the fifth, eighth, and ninth issues.

The plaintiff produced the patent in evidence; and gave evidence to show that a machine constructed as his was, had never been in use before the patent. No evidence was given by either party as to the invention having been communicated to the plaintiff by a foreigner residing abroad. *722] I thought that the plaintiff should *have given evidence of the affirmative; and directed a verdict for the defendant on the first and third issues—the plaintiff having leave to move to enter it in his favour.

With regard to the fifth issue, viz. that the alleged invention was not new, the jury found that a hollow spindle used in the plaintiff's machinery was not new; but that using it fixed, instead of revolving, was new: and a verdict was taken for the plaintiff on all the issues except the first and third, subject to a motion, as before stated, if the court, upon reading the specification, should think that it claimed the hollow spindle, not only when fixed, but also revolving, or that it did not sufficiently distinguish between what was claimed as new, and what was disclaimed as old.

The *Attorney-General*, accordingly, obtained a rule to enter a verdict for the plaintiff on the first and third issues; and Mr. *M. D. Hill* obtained a cross-rule to enter a verdict for the defendant on the fifth, eighth, and ninth issues: he also moved for a new trial, on the ground of parol evidence having been admitted to show what the specification claimed as new, but my notes of the evidence do not show that any such evidence had been received; and on the ground that the verdict for the plaintiff was against evidence.

Upon the question raised as to the first issue, the court is of opinion, that there are strong reasons for saying that the plea of *non concessit* did not impose on the plaintiff the burthen of giving evidence to show that the crown had power to grant, until evidence to impeach the patent had

been given on the other side; and also that the averment in the declaration "that the plaintiff was the inventor of the improvements for which the patent was granted," not having been traversed, the defendant was not at liberty at the trial to controvert that fact. But, without deciding either of *those points, it appeared to us that the rule for entering a verdict for the plaintiff on that issue must be made absolute, [*723 there being evidence at the trial,—viz. that no such machine as the plaintiff's had been known until his was made,—that the plaintiff was the inventor.

As to the third issue, viz. that the plaintiff obtained the patent by means of a false representation to Her Majesty,—the court is of opinion that it was for the defendant to prove the affirmative, and that the record did not (as was contended in argument) show the falsehood of his representation,—a party having received information from abroad, being an inventor within the meaning of the stat. 21 Jac. 1, c. 3, s. 6. Upon this issue, therefore, the plaintiff is entitled to have the verdict entered in his favour.

With respect to the cross-rule,—upon a careful examination of the specification, we think that it does sufficiently distinguish between what is claimed as new, and what is disclaimed as old; and also that it claims the hollow spindle, not generally, but fixed,—so that the finding of the jury, that the hollow revolving spindle was not new, does not negative the novelty of that which the plaintiff claimed. The verdict, therefore, upon those issues, will remain undisturbed, the court not finding any sufficient grounds for saying that it was contrary to the evidence in the cause.

Rule accordingly. (a)

(a) As to pleading in denial of the operation of instruments, see 3 N. & M; 50, n. (c); 4 N. & M. 322. n. (b); 5 Mann. & R. 464; 1 M. & G. 203.

***DOE d. HENRY EUSTATIUS STRICKLAND v. Sir GEORGE STRICKLAND, Bart. Dec. 8. [*724**

The testator executed a will in Yorkshire, in 1776, he then having four sons. A fifth son being born in 1777, the testator, in 1778, executed in London what was apparently intended to be a copy of, and was dated on the same day as, the Yorkshire will, and at the same time made a codicil in duplicate,—the ostensible object of the codicil being, to make provision for the newly-born son. The testator's third son died in 1795. The testator died in 1808, leaving the other four sons him surviving. After his death, the Yorkshire will, with one copy of the codicil, were found in an open portfolio upon his library table, with erasures in both, the effect of which would be, in a certain event, to give to the eldest son certain estates which otherwise would have gone to the younger sons in succession. The London will, with the other copy of the codicil, were found, without alteration, locked up in a drawer in the same table. In the portfolio was also found an undated and unfinished sketch of a will. The Yorkshire will, and the codicil found with it, were proved by the testator's widow and executrix. After the death

of all his brothers, the testator's fifth son brought an ejectment against the heir of his eldest brother, claiming under the limitations contained in the unaltered (or London) will and codicil. At the trial, the judge left it to the jury to say,—first, whether the London will was executed by the testator as a separate and independent will, or whether the Yorkshire will and the London will, with the duplicate codicil annexed to each, formed one will, the last will of the testator; telling them, *that, if they were satisfied that all the documents together formed one will in two parts, an alteration or obliteration in one part, was, in point of law, an alteration or cancellation of the corresponding portion of the other part, and that the will, so altered, became the last will of the testator*,—secondly, whether the alterations, when they were made by the testator, were intended by him to be final, and to stand as his last will, or were merely deliberative, and intended to exist only until he made a future will. The jury found that the two wills and the codicil were intended to form one will, and that the alterations in the Yorkshire will, and in the codicil found with it, were intended to be final:—

Held, that these two questions were properly submitted to the jury, and that the direction of the judge was correct in point of law.

Held, also, that it was no ground for a new trial, that the judge left to the jury as a question of fact, that which he should himself have decided as a matter of law,—unless the objection was presented to the notice of the judge at the trial.

THIS was an action of ejectment whereby the lessor of the plaintiff sought to recover certain estates in the county of York.

*The declaration contained two demises, both by Henry Eustas-
*725] tius Strickland, the one laid on the 3d of December, 1839, the other the 3d of May, 1838.

The defendant, who was let in to defend as landlord, pleaded not guilty.

The cause was tried before ALDERSON, B., at the last York spring assizes.

The facts that appeared in evidence were as follows:—Sir George Strickland, Bart., of Boynton, in the county of York, the father of the lessor of the plaintiff, and grandfather of the present defendant, on the 18th of July, 1776, being then in Yorkshire, made a will, which was duly executed and attested, as follows:—

“In the name of God, amen: I, Sir George Strickland, of Boynton, in the county of York, Bart., do make this my last will and testament, in manner following, that is to say, I give to my wife my house at Newton, with the farm I now occupy there, for her life: I also give to her my house at Hildenley, with the estate here, for her life: I also give to her my house at Awburn, with the land I now occupy there and so the farm in the occupation of Thomas Dobson, for her life: I also give to her all the stock and everything that shall be upon any of the above-mentioned grounds at the time of my decease, desiring her to leave, as near as conveniently may be, the stock of equal value upon the several grounds above-mentioned, or money equivalent thereto, to those who shall succeed her therein: I also leave to her, after the payment of my debts and all other expenses due from me, all the money which I shall leave at the time of my decease, with all arrears of rent due to me at that time, and all other money due to me at that time from any other person, together with all my Bank bills, and all other bills, and all money

owing to me on Government or any security whatever: *Now, my meaning is, that, if I should leave any money upon Government [*726 or any other security whatever, that she should receive the interest of it for her life, and that she should leave it to such of my younger children as she thinks proper, or else that it should be divided equally among all my younger children: And I give to her any of my books or furniture that shall be in my house at Boynton at the time of my decease, that she shall chuse: I also give her all my carriages, horses, and stock of sheep and other things that shall be, at the time of my decease, upon any ground I occupy at that time at Boynton, Carnaby, or elsewhere, with all my tea, table, and Sheffield plate, or any other she shall chuse to take. My estate at North Bruton, by a settlement made by my father(a) will go to my son William: and my estate at Boynton, by my marriage-settlement, will also go to him. I further give him the lease I have at Boynton, from Pocklington School; also the land late belonging to Sir Griffith or Mr. Boynton; and also the land and appurtenances I bought there; and also my estate at Carnaby: Now, my meaning is, to give him the above lease and land at Boynton, and estate at Carnaby, provided that he will relinquish to the purposes of this will, to be hereafter mentioned, the estates at Wintringham, East Heslerton, and Knapton, which would otherwise devolve to him by a settlement made by my father: but, should he determine to retain those estates, then I leave my estate at Carnaby, with the before-mentioned lease and land at Boynton, to my son George, for his life: I also leave to him, for his life, my estates at Newton and Kirby: I also leave him my estates at Wintringham, East Heslerton, *and Knapton, for his life, provided my son William will take my estate at Carnaby, with the estates above-mentioned at Boynton, [*727 instead of them; in which case, I would have the proportion of the jointure payable to my wife out of the estate at Carnaby, to be paid out of the estate at Wintringham: And, should my son William retain the estate at Wintringham, I give my son George, for his life, all the land and houses and appurtenances that I have bought there; I also empower my son George to settle, out of the estates left to him, 300*l.* a year, as a jointure, upon his wife, and 5000*l.* out of the same as fortunes for his children: I also leave to him all the stock and everything which shall be upon my farm at Newton, or belonging thereto, at the time it comes into his possession. That part of my estate at Newton which I have settled upon my wife for her life, I mean for my son George to inherit after her decease: Now, I leave the above-mentioned estates to my son George, subject to the payment of 100*l.* a year to each of my unmarried daughters, so long as they continue unmarried, and to be paid to them half-yearly: I also leave my estate at

(a) In the copy of the will executed in London on the 15th of May, 1778, the words were,—“by a settlement made by my father's will, will go,” &c.

Hildenley, after the decease of my wife, to my son Charles, for his life ; and my estates at Birkwith, Easton, and Suerby, to him for his life, with a power to settle out of the above estates 300*l.* a year upon his wife, and 5000*l.* out of the same as fortunes for his children : I leave the above-mentioned estates to my son Charles, subject to the payment of 50*l.* a year to each of my unmarried daughters, so long as they continue unmarried, and to be paid to them half-yearly : I also leave my estates at Fraisthorp, Willsthorp, and Auburn, to my son Walter, for his life, to inherit what is left to my wife for her life, after her decease, with a power to settle out of the above estates 300*l.* a year, as a jointure, upon his wife, and 5000*l.* out of the same, as fortunes for his children ; I leave the above-mentioned

*728] estates to my son Walter, subject to the payment of 50*l.* a year to each of my unmarried daughters, so long as they continue unmarried, and to be paid to them half-yearly. Such parts of my estates as I have left to my wife for her life, I mean to devolve to such of my sons as I have afterwards left them to. I give to my younger sons a power to dig up or cut down anything upon any of the estates I have left them for their lives. In case my son George should die before my son Charles, I then leave all the estates I have left to my son George, to my son Charles, for his life, he paying to my son Walter, and to each of my unmarried daughters, so long as they continue unmarried, 100*l.* a year over and above the annuities before mentioned.(a) [*But, if my son Charles should be dead at the time of the decease of my son George, I then give all the estates I have left to my son George, to my son Walter, for his life, he paying the same annuities as my son Charles would have done. And, whichever of my sons Charles or Walter should die first, I leave the estates I have given to either to the survivor of them, he paying 50*l.* a year, over and above the 50*l.* a year first payable out of the estates, to each of my unmarried daughters, so long as they continue unmarried. And, if both my sons Charles and Walter should die before my son George, I then leave the estates I have left to both of them, to my son George, for his life, he paying out of each of them an annuity of 100*l.* to each of my unmarried daughters, so long as they continue unmarried:] After his death, to my son William ; with a power to leave them to such of his sons as he thinks proper, for their lives, subject to the same annuities as before. But, in case he leaves no sons, or in case of*

*729] failure of issue male from them, then to the heirs male of my other sons, in succession. And, provided my estates which I have left to my younger sons come into the possession of my eldest son, or his sons, or into the possession of any of my younger sons' sons, I then leave a further annuity of 100*l.* a year to each of my unmarried daughters, so long as they continue unmarried, over and above

(a) The part within brackets and in italics was afterwards erased by the testator from the will executed in Yorkshire.

the annuities before mentioned. And, in case any of my younger children should not have attained the age of twenty-one years, at the time of my decease, I would have my wife receive the rents and annuities left to each of them, for their education and benefit: and I hereby make my wife the sole guardian of my children. And whereas I have left all the estates I have given to my younger sons for their lives, after their decease, to my eldest son and his issue male,—my meaning is, that he or they shall enjoy the same only upon condition that he or they will settle all my estates which will come to him or them after my decease, by virtue of any will or settlement heretofore made, in case of failure of issue male from him or them, upon my other sons and their issue male in succession, and, in failure of them, in the same manner as I settle the rest of my estates in failure of issue male from me: but, in case of his or their refusal to comply with the above settlement, I then leave all the estates I have left to my younger sons for their lives, to them and their heirs male in succession. In case the whole of my estate comes into the possession of my son William, or his issue male, by the death of all my younger sons, I then give to each of my younger sons' children 1000*l.*, to be paid out of my estates which I give to my younger sons for their lives. And, in case all my estates come into possession of any of my younger sons,^(a) or their issue male, by the death of my eldest *son without issue male, I then also give 1000*l.* to each of the [*780 children of my other younger sons, to be paid in like manner. But, if all my sons die without issue male, I then leave all my estates to my cousin Walter Strickland, and his issue male; and then to my cousin William Strickland, and his issue male; they and each of them paying to each of my daughters and sons' daughters an annuity of 200*l.* a year, over and above the annuities payable before: and, in case of failure of heirs male from them, to my heirs female. And I hereby make my wife sole executrix of this my will. It is my meaning, and I do hereby empower my son William, or any other of my sons, when he or they shall be in possession of the estates hereby devised to him or them, in case of failure of issue male from him, whereby they may become possessed of the estates settled upon him, to charge the same with any annuity, not exceeding 800*l.* a year, upon any woman he or they may hereafter marry, and as a jointure, and in bar of dower, to be payable at such times and in such manner as he or they shall think fit, with all the necessary and usual powers for enforcing the payment thereof; and also with any sum or sums of money, not exceeding the sum of 1000*l.* in the whole, together with an annuity of 200*l.* a year, upon each of his unmarried daughters, so long as they continue unmarried, for the fortune and as a

(a) In the copy of the will executed in London in May, 1778, the words were "any of my younger sons' sons."

provision for any daughter or daughters he or they may happen to leave at his or their deaths, and to be payable at such time or times, and in such manner, as he or they, by will or otherwise, shall direct and appoint; anything herein contained to the contrary notwithstanding. In witness whereof, I have to this my last will and testament, contained in two *781] sheets of paper, to the first set my *hand, and to this my hand and seal, this 18th day of July, 1776.

G. STRICKLAND. (L. S.)

"Signed, sealed, published, and declared by the said testator as and for his last will and testament, in the presence of us, who, in his presence and at his request, have subscribed our names as witnesses hereunto."

"THOMAS PHILLIPSON,

"EDWARD GILL,

"JOHN TAYLOR."

At the time of executing this will, the testator had four sons,—William, George, Charles, and Walter. Another son, Henry Eustatius (the lessor of the plaintiff), was born in August, 1777.

On the 15th of May, 1778, the testator, for the ostensible purpose of making a provision for his son Henry Eustatius, being then in London, made a codicil to his will, which he executed in *duplicate*, and at the same time re-executed a copy of the original will, dating the copy as of the day of the execution of the original will; the codicils and copy being both attested by the same witnesses.

The codicil was as follows:—

"This is a codicil, to be annexed to, and taken as part of, the last will and testament of me, Sir George Strickland, of Boynton, in the county of York, Bart., dated the 18th day of July, 1776: Whereas, my youngest son, Henry Eustatius, was born since the date of my said will, and is therefore unprovided for by it: And whereas, an exchange hath taken place of part of my entailed estates for part of the lordship of Carnaby, which exchange is confirmed by articles or settlement made on the marriage of my eldest son: And whereas *there is a parcel of land, *782] in the lordship of Carnaby, situate at the south end of Carnaby Field, of the yearly value of 120*l.*, excepted out of the said exchange, and which I have power to dispose of, and there is due to me from the estate at Carnaby the sum of 5000*l.*, which by the above articles or settlement is charged on that estate; and I am also entitled to an annuity of 19*l.* a year issuing out of an estate at Carnaby belonging to Mr. Buck: Now, I give the said sum of 5000*l.* to my said son Henry Eustatius, and devise to him the parcel of land of 120*l.* a year, and the said annuity of 19*l.* a year, to enjoy the said land and annuity during his life: And my will is, that the said land and annuity, after the decease of my said son Henry Eustatius, and subject to and charged with such jointure for a wife as

shall be made by him, according to the power hereinafter given him in that behalf, shall go to and be enjoyed by such person or persons as shall be then entitled to my estate at Fraisthorp, and for such estate and interest, and with such powers, remainders, and reversions dependent thereon, as such person or persons shall be entitled to the Fraisthorp estate: And whereas I have by my said will devised certain specific estates to my younger sons George, Charles, and Walter respectively, for their respective lives, with power to make jointures upon their respective wives, and provision for their respective children, and otherwise charged as therein mentioned; and, upon the decease of any one of my said three last-named younger sons, I have devised the estates left to him so first dying, unto one or other of the survivors of them three, with such further benefit of survivorship between them, and with such remainders over, and charged as in my said will mentioned: Now I do hereby revoke the last-mentioned disposition [*in(a) *case my said son Henry Eustatius shall be then living, and in that* [*783 *case I devise the specific estates above disposed to him so first dying, after such decease, unto my said youngest son Henry Eustatius, for his life, charged in like manner, and with such power of making a jointure for a wife, as in my said will mentioned and given to any of my said other younger sons respectively:*] And, after the decease of my said son Henry Eustatius, I devise the last-mentioned estates, charged and chargeable as aforesaid, unto such person or persons, in such manner, and for such estate, and subject to such powers, charges, and out-payments, and with such remainders and reversions, as I have by my said will declared concerning the same after the decease of the younger sons so first dying: [*And,(a) in case my said son Henry Eustatius shall survive all my other younger sons, my will is, that he shall succeed to the specific estates devised to them respectively, and enjoy the same during his life, charged as in my said will, and with such remainders over and reversion as therein mentioned:*] And, least any mistake should arise in regard to my meaning of empowering my younger sons respectively to make jointures for their wives, and provision for their respective child or children, I do hereby expressly charge and subject the respective estates devised to my said younger sons respectively for life, with the payment of 800*l.* a year, clear of all taxes and deductions, to the wife, or respective wives, of such younger son and younger sons respectively, and with the sum of 5000*l.* for the portion or portions of the child or children of my said younger sons, George, Charles, and Walter Strickland, respectively, but not with any portion for the child or children of my said son Henry Eustatius, who has 5000*l.* given him as aforesaid,—such children of my sons George, Charles, and Walter Strickland, if there shall be more than one of any of them my said last-named *sons, [*784

(a) These words within brackets and in italics were afterwards erased by the testator from one copy of the codicil.

shall share the said sum of 5000*l.* equally between them: and in all other respects I confirm my said will. In witness, &c.

G. STRICKLAND. [L. S.]

“Signed, sealed, published, and declared
by the said Sir George Strickland, the tes-
tator, as and for a codicil to his will, in the
presence of us, who have subscribed our
names, as witnesses thereto, in his pre-
sence, and at his request.”

“JONA PRICE, Salters’ Hall, London.

“W. DAVIDS, }
“JOHN JONES, } Clerks to Mr. Price.”

The testator, Sir George Strickland, died at Boynton on the 13th of January, 1808, leaving four daughters, and four sons,—William (who then became Sir William), the father of the now defendant, George, who died in June, 1832; Walter, who died in October, 1839, and Henry Eustatius, the lessor of the plaintiff: the testator’s third son, Charles, having died in the testator’s lifetime, in 1795.

On the testator’s death, the will which he had originally executed in Yorkshire, together with one copy of the codicil, were found in an open portfolio upon his library table,—the parts above set out in italic and within brackets being obliterated by drawing a pen through them, leaving the writing still legible. In the same portfolio was found what appeared to be an unfinished testamentary paper, undated, and bearing upon the face of it indications that the mind of the writer was still in deliberation upon it.

Locked up in a drawer in the same table, and as originally written, and without any alteration, was *found the other copy of the *785] codicil, and also the copy of the will which the testator executed in London.

The *altered* will and codicil found in the portfolio were proved by Lady Strickland, as the last will and testament of her deceased husband,—at York, in December, 1808, and in the diocese of Canterbury, in January, 1809.

The testator’s sons George and Walter, upon his death, entered upon the estates respectively devised to them. Upon the death of George, on the 5th of June, 1832, the late Sir William Strickland took possession of his estates, in opposition to his brother Walter, who declined to contest the matter with him.

Sir William Strickland died on the 18th of January, 1834.

In November, 1839, the lessor of the plaintiff,—into whose possession the *unaltered* copy of Sir George Strickland’s will and codicil had come, in his character of executor under the will of his mother,—commenced proceedings in equity against the defendant, Sir William’s eldest son. The lord chancellor having, upon appeal, in 1848, decided that the

remedy of the lessor of the plaintiff was by an action at law, he, in April in that year, formally demanded possession of the estates, and, upon the defendant's refusal, brought this ejectment.

On the part of the plaintiff, it was contended, that, from the circumstance of the London will being found, with a codicil, unobliterated, and *carefully* kept, both wills and codicils being under the testator's immediate personal control,—the partial obliteration of one, had not, in law, the effect of a revocation.

The learned baron left it to the jury to say,—first, whether the London will was executed by the testator as a separate and independent will, or whether the Yorkshire will and the London will, with the duplicate *codicil annexed to each, formed one will, the last will of the testator; telling them, that, if they were satisfied that all the documents together formed one will in two parts, an alteration or obliteration in one part, was, in point of law, an alteration or cancellation of the corresponding portion of the other part, and that the will, so altered, became the last will of the testator,—secondly, whether the alterations, when they were made by the testator, were intended by him to be final, and to stand as his last will, or were merely deliberative, and intended to exist only until he made a future will. [*736]

The jury found that the two wills and the codicil were intended to form one will, and that the alterations in the Yorkshire will, and in the codicil found with it, were intended to be final. A verdict was thereupon entered for the defendant.

Knowles, in the following Easter term, moved for a rule nisi for a new trial, on the ground of misdirection. It was properly a question for the jury, whether the alteration of the one paper was an alteration of the other: at most, it was a question of inference and presumption. To tell the jury that the alteration of one was necessarily an alteration of the other, was clearly laying down the proposition too broadly, and in a manner calculated to mislead the jury, and to destroy the materiality of that which had been mainly relied on by the lessor of the plaintiff at the trial, viz., that both documents were in the custody and under the control of the testator at the time he made the alteration. The question of intention should have been submitted to the jury. In *Williams on Executors*, 4th edit. p. 126, it is said: "If a will be executed in duplicate, and the testator keeps one part himself, and deposits the *other with some other person, and the testator mutilates or [*737] destroys the part in his own custody, it is a revocation of both.(a) The presumption of law, in such case, liable of course to be rebutted by evidence, is, that the destruction or mutilation of the one duplicate was

(a) Referring to *Sir Edward Seymour's case*, cited Com. Rep. 453, 1 P. Wms. 346, 2 Vern. 742; *Onions v. Tyer*, 1 P. Wms. 346; *Burthenshaw v. Gilbert*, Cowp. 49; *Boughey v. Moreton*, 2 Cas. temp. Lee, 532, 3 Hagg. 191; *Richards v. Mumford*, 2 Phillim. 23; *Colvin v. Fraser*, 2 Hagg. 266.

done *animo revocandi* as to both. And, in *Pemberton v. Pemberton*, 18 Ves. 310, Lord ERSKINE, C., laid down that the same presumption holds, though in a much weaker degree, where both the instruments are in the testator's possession: and, further, that, in a third case, where the testator, having both duplicates in his possession, alters one, and then destroys that which he has altered, there also the same presumption holds, though weaker still. But, in *Roberts v. Round*, 3 Hagg. 548, the testatrix executed her will in duplicate in the year 1814: the will was kept by her, and the duplicate, immediately after execution, was left with her solicitor, who retained possession of it till the year 1827, when he delivered it to her, at her request: on her decease, in the year 1830, the will and duplicate were found in her portfolio, which was on her bed at the time of her death: the will was enclosed in an envelope, endorsed in her handwriting, 'My will, dated the 11th of April, 1814,' and with the word 'mine' written by her in pencil on the outer sheet of the will: the duplicate had been mutilated, by cutting out the names of several of the devisees: and Sir JOHN NICHOLL held that such mutilation was neither a total nor a partial revocation. The learned judge, in pronouncing his judgment, made the following observations: 'What, upon the face of *738] the instrument, are the sound legal construction and presumptions? Suppose that the mutilated instrument alone had been found, and that no duplicate had ever existed. This mutilation of the first sheet, leaving the signature untouched, would not be a total revocation; it would be a revocation of those particular devises only; but, there being two papers, both in the deceased's possession, *the presumption of law would be, that, by the preservation of one duplicate entire, she did not intend a revocation of these particular devises*, otherwise she would have mutilated both duplicates. The construction, then, to be put upon this act of mutilation (for, it clearly appears to have been her own act), is, that, at most, it was a preparation for a projected alteration, to which she had not finally made up her mind, or which she had abandoned; and therefore she preserved entire the duplicate, which she had always retained in her own possession, and on which she had written the word 'mine.''' [WILDE, C. J. The judge there decides upon the fact, as well as the law.] A distinction has always been drawn as to whether the duplicate is or is not in the custody or power of the testator at the time. In *Goodright d. Glazier v. Glazier*, 4 Burr. 2515, Lord MANSFIELD mentioned a case at the delegates, of *Mason v. Limbrey*, where "the testator, Samuel Mason, made his will of his real and personal estate, and properly executed two duplicates of it, one of which duplicates he kept in his own hands, the other he delivered to Mr. Limbrey. A little before his death, he greatly altered and obliterated his own duplicate, and began to write over a new will, but never finished it, nor did he ever apply to Limbrey to get back his duplicate. Sentence was given for the duplicate of the first will, remaining in Mr. Limbrey's

*hands; for, the imperfect sketch of the unfinished second will was no revocation of the first." [V. WILLIAMS, J. That case [*739 is reported at length by Comyns, by the name of *Limbery v. Mason and Hyde*, Com. Rep. 451.] Then, it was for the judge, and not for the jury, to say whether or not the two were duplicates. [WILDE, C. J. Two instruments cannot well be duplicates, if the one has an effect very different from the other.] Certainly not.

A rule nisi having been granted,

S. Martin (with whom was *Cowling*) now showed cause. There was no misdirection. The facts are simple. In 1776, Sir George Strickland, having then four sons, made a will in Yorkshire. Afterwards, a fifth son being born to him, Sir George, in 1778, executed a copy of the will of 1776 in London, and also a codicil in duplicate, making a provision for his newly-born son. There is no further evidence given of any act done by Sir George with regard to these documents. At his death, the Yorkshire will and one copy of the codicil were found together in a portfolio upon a table in the library at Boynton House, with a portion of each obliterated,—the effect of the alterations being, to deprive the lessor of the plaintiff of certain interests which he might have had in remainder expectant on the deaths of his brothers. Acting upon the opinion of Chief Baron RICHARDS, then at the bar, that the altered will and codicil alone constituted the last will and testament of her deceased husband, Lady Strickland, as his executrix, proved them. Under these circumstances, the questions of fact, it is submitted, were properly left to the jury, and the ruling of the learned judge in point of law was correct. It is *difficult to see what other question could have been sub- [*740 mitted to them. [MAULE, J. The second or London will, it will be said, might pass property acquired between the day of its date and its execution. I am not aware of any case of a will being dated at one time and executed at another. V. WILLIAMS, J. The codicil makes the Yorkshire will speak as of the date of the execution of the London will. MAULE, J. The testator clearly intended to make *one* will and duplicate codicils.] The authorities as to the effect of an alteration, as a revocation of a will, are all considered in 1 Williams on Executors, 120 *et seq.*: the result is, that, to constitute a revocation, the act must be done *animo revocandi*. Here, the jury have found, and upon evidence which clearly justifies their finding, that the alterations were intended by the testator to be final. There is no pretence for disturbing the verdict.

Knowles and *Hugh Hill* in support of the rule. The London will was an entirely new will, independently of any intention on the part of the testator. It would necessarily have a much larger operation than the Yorkshire will; and the attesting witnesses being different, it would require different proof. The learned judge left it to the jury to say whether the second will and codicil were a duplicate of the Yorkshire will and codicil. [CRESSWELL, J. No. Whether the

London will was a separate and independent will ; or whether the Yorkshire will and the London will formed one will in two parts.] That is substantially the same thing. Either way, it was clearly a misdirection. The learned judge should have himself decided, that, in point of law, the London will was not part of the will executed in 1776. [MAULE, J. That the will of 1776 formed no part of the will of the testator.] By leaving the question to the jury in the way he did, the lessor of the *741] *plaintiff was deprived of the opportunity of tendering a bill of exceptions. A man can have but one last will ; though that may be evidenced by several documents ; and these need not all bear the same date, for a man may at different times dispose of different portions of his property. But, if there be different documents relating to the same property, which are inconsistent in their terms, they cannot together constitute the last will ; the last executed would, in that case, alone express the last intention of the testator. In Jarman on Wills, vol. i. p. 158, it is said : “ Where a testator at different periods of his life has made various testamentary papers, some of which he destroys, and others he leaves undestroyed, each purporting to contain his last will, this character belongs exclusively to such one of the uncanceled papers as was executed most proximately to his decease ; (a) and, in order to ascertain the time of the execution of the respective papers, recourse may be had to evidence, derived either from their own contents, or from extrinsic sources. If, from the absence of date and of every other kind of evidence, it is impossible to ascertain the relative chronological position of two conflicting wills, both are necessarily held to be void, and the heir, as to the realty, and the next of kin, as to the personalty, are let in : but this unsatisfactory expedient is never resorted to, until all attempts to educe from the several papers a scheme of disposition consistent with both, have been tried in vain. (b) And, even where the times of the actual execution of the respective papers are known, so that, if they are inconsistent, there can be no difficulty in *determining which is to be *742] preferred, the courts will, if possible, adopt such a construction as will give effect to both, sacrificing the earlier so far only as it is clearly irreconcilable with the latter paper ; supposing, of course, that such latter paper contains no express clause of revocation. As, where a testator made a will devising his lands to trustees, for 200 years, to pay his debts, and afterwards, by another will, devised the same lands to the same trustees for 300 years, to discharge some particular specialty debts mentioned in a deed executed after the first will, and all encumbrances affecting the property,—Lord TALBOT held that the first term of 200 years was not revoked, as the two terms were not inconsistent, the testator’s intention in creating the term of 300 years being merely for the purpose of giving priority in payment to the specialty debts, and the

(a) Citing *Goodright d. Glazier v. Glazier*, 4 Barr. 2512 ; *Harwood v. Goodright*, Cowp. 92.

(b) Citing *Phipps v. The Earl of Anglesea*, 7 Bro. P. C., Toml. ed., 443.

charges affecting the estate.(a) The inclination to such a construction as would preserve, either wholly or in part, the contents of the prior document, however, exists only either when the subsequent document is inadequate to the disposition of the entire property, so that the consequence of rejecting the prior document would be, to produce partial intestacy, or else where the posterior paper is styled a codicil; for, the office of a codicil being, to vary or add to, and not wholly supplant, a previous will, such a designation of the instrument seems to demand that some part, at least, of the will, whose existence it supposes and recognises, should, if possible, be sustained." The two instruments are not duplicates of the same will, if there is any variation or difference between them: and parol evidence clearly is not admissible to explain a variance. If these two papers be held to form together one will, it can only be upon the ground that the dispositions in the later one *are cumulative. [*743 [CRESEWELL, J. Suppose two copies of a will made and executed at the same time, and a word is accidentally omitted from one in the copying, and the testator afterwards, *animo cancellandi*, destroys one,—would that be a cancellation of both?] It would not, if the omission constituted a material variance; for, in that case, they would not be duplicates.

MAULE, J. I am of opinion that this rule,—which was obtained upon the ground of misdirection,—should be discharged. The objection to the direction of the learned judge to the jury, was, that he left to them that which he ought himself to have decided as a matter of law. There is also a suggestion that the way in which the questions were put to the jury, was calculated to embarrass and mislead them. But this does not amount to an objection upon which a new trial can be granted. It would be extremely mischievous, if a verdict could be set aside, because the court may think that the judge who presided at the trial has laid too much or too little stress upon this or that part of the case, or has, in some way, dealt differently with the facts from what they themselves would have done had the cause been tried before one of them. If it were so, the number of new trials,—which are a reproach to the law,—would be greatly increased. There can hardly be a greater evil in the administration of justice, than the expense and delay to which suitors are occasionally exposed from the necessity of setting right those errors which sometimes unavoidably occur on the trial of a cause. I may as well, before I proceed to consider the main question, clear away another point which was made in the course of the argument, viz. that, supposing there was a question of law which was left to the jury as a question of fact, even assuming the jury to have come to what in the opinion of the court *was the right conclusion, there ought to be a new trial, [*744 because the party against whom the decision was given, had, by the course taken, lost the opportunity of tendering a bill of exceptions.

(a) *Weld v. Acton*, 2 Eq. Cas. Abr. 777, pl. 26.

There is no foundation for that assumption. It is not true that the party has lost his opportunity of tendering a bill of exceptions, by the course the judge took in his summing up. His counsel might have interposed, and called the attention of the judge to the fact that he was leaving to the jury a question of law, and might then, if necessary, have tendered a bill of exceptions. By not having so interposed, however, the lessor of the plaintiff has not lost more than a party loses in all cases, where he omits to take an objection at the proper time. The party has always his election between a bill of exceptions and a motion for a new trial. Here, he has elected to move for a new trial, on the ground of misdirection: we have now to decide, therefore, whether the learned judge left the proper questions to the jury, and whether he correctly instructed them in point of law.

The first question left to the jury was, whether what was called the London will, was executed by the testator as a separate and independent will, or whether the Yorkshire will and the London will, with the duplicate codicil annexed to each, formed one will. If these documents *could* form one will in two parts, and that question was raised by the evidence, undoubtedly it was a material question in the cause, and one which was proper to be submitted to the jury. It is a question which can only be decided by a consideration of a great many circumstances. It is one which frequently arises in the ecclesiastical courts; and there it is uniformly treated as a question of fact. It is suggested by Mr. *Hill*, that, there being a variance between the London and the Yorkshire will, though *745] with reference to matters not in question here, they cannot be *considered strictly as duplicates. It is to be observed that the learned judge carefully avoids the use of the word "duplicate," with regard to the wills. The codicils, however, are strictly duplicates: the wills are not, if the discrepancies pointed out prevent them from being so considered. It seems to me to be quite unnecessary to say whether they are or are not duplicates, properly so called: the case does not require it. There is nothing to show that there may not be one will, consisting of two separate and distinct papers, which are contemporaneously executed, and intended each to be the same will. Here was a simultaneous execution of the two codicils and of a copy of the will. That is clear. The testator has evinced an intention that the whole should, if possible, together operate and enure as his last will: and there is nothing, that I am aware of, against reason and law in a testator's entertaining such an intention. I think the question was one which was very fit to be left to the jury.

Then comes the next question. The learned judge told the jury, that, if the Yorkshire will and the London will, with the codicils respectively annexed to each, were intended by the testator to operate together as his last will, the effect of an alteration or obliteration in one, was, to alter or obliterate the other; and that the altered part became the last

will of the testator. There is no question here as to a revocation or cancellation of the whole instrument, but only as to certain alterations made in the one document, and in those parts which are in duplicate and unaltered in the other. Now, inasmuch as with respect to that property, the two documents were intended to operate simultaneously, and together to form the last will (assuming the first question to have been rightly left and rightly decided), then the partial cancellation of the one was, in principle and upon authority, a cancellation of the corresponding *portion of the other. Each part fully and entirely expresses the will and intention of the testator. Having subsequently [*746 expressed a different intention by the partial obliteration of one, the alteration so made must be taken to express the testator's last will. I therefore think the proposition of law so laid down by the learned judge, was correctly laid down. This direction of the learned judge is objected to, as being likely to withdraw the attention of the jury from circumstances upon which the counsel for the lessor of the plaintiff had mainly placed reliance, viz., the fact that one of the wills only was altered, when both were equally accessible to the testator, and that the unaltered will seemed to have been kept with the greater care. These, undoubtedly, were circumstances very fit to be taken by the jury into their most serious deliberation, in coming to a conclusion as to the intention with which the alterations were made. If the unaltered part had been found in London, instead of at Boynton, that unquestionably would have strengthened the presumption of intention to alter both parts. All that can be said, however, is, that these were matters very fit to be observed upon; and the jury must be taken to have fully considered them.

The remaining question which was left to the jury, was, whether the alterations, when they were made by the testator, were intended by him to be final, and to stand as his last will, or were merely deliberative, and intended to exist only until he made a future will. That was leaving to the jury a question of the intention of the testator, which was a question of fact, and one which was undoubtedly a proper one for them. The jury found that the alteration was intended to be final. As to that mode of leaving the question, I do not know that any very serious objection has been urged: but it seems rather to have been suggested that the previous ruling of the learned judge as to the legal *effect of the alteration of the Yorkshire will, had a tendency to divert [*747 the minds of the jury from the surrounding circumstances upon which their judgment was to be formed. That objection I have already disposed of.

Upon the whole, it seems to me that the direction of the learned judge was correct in point of law, and that the jury properly decided the questions submitted to them, and therefore that this rule must be discharged.

CRESSWELL, J. I am of the same opinion. My brother MAULE has gone so fully into the case, that but little remains for me to add. As to

the lessor of the plaintiff's being deprived of the opportunity of tendering a bill of exceptions, by the circumstance of the judge leaving to the jury that which was a matter of law for his own consideration,—I remember to have heard Lord TENTERDEN decide over and over again, that that was no ground for a new trial, where the jury had found as the judge ought to have directed them to find. If the counsel had made his exception at the proper time, the judge would probably have said, "Then, I will decide it myself." And, though we cannot tell how a jury would decide upon a question of fact, we will assume that a judge, when called upon to decide a question of law, will decide it correctly; for, that is the ground upon which it is held that many defects are cured by a verdict.

As to the other matters,—the first question which was left to the jury, was, whether the London will was executed by the testator as a separate and independent will, or whether the Yorkshire will and the London will, with the duplicate codicil annexed to each, formed together the testator's will. The judge says nothing about duplicate wills. If the two *could* *748] not together form one will, it was undoubtedly incorrect to leave *that question to the jury. It appeared, that, in 1776, Sir George Strickland made a will in Yorkshire; and that, in 1778, another document, which was apparently intended to be an exact copy of the will before made, was executed by him in London; two codicils in precisely the same terms being executed by him at the same time. If republished at the date of the execution of the copy and the codicils, the will made in Yorkshire in 1776 would speak from May, 1778. The testator annexed a copy of the codicil to each will. Did he not thereby intend the codicil to operate as a republication of the Yorkshire will? I think this question was properly left to the jury: and no objection is made to their finding upon it.

The next objection that was made, was, that the learned judge told the jury, that, if the two documents, with the codicils respectively annexed to them, were intended to operate together as the testator's last will, an alteration of one will enured in point of law as an alteration of both. It appears to me that that was strictly correct. I understand the provisions in the Yorkshire will and the London will, as to the estates now in question, to be precisely the same. If the Yorkshire will was republished at the time the London will and the codicils were executed, it is impossible to say that the one was earlier in point of time than the other. They are contemporaneous. By obliterating a portion of the Yorkshire will, the testator did not destroy an earlier and leave a later will: but, the two being contemporaneous, by erasing one, he shows his then will to be, that the portion so erased should form no part of his last will. I therefore think the learned judge was perfectly right in the direction which he reports to us that he gave to the jury, viz. that the alteration in the Yorkshire will had the effect of altering the corresponding clause in the London will.

*The last question was, whether the alterations were intended by the testator to be final, and to stand as his last will, or whether they were merely deliberative, and intended to exist only until he made a further or future will. That, as it seems to me, was a proper and a most important question,—the very hinge upon which the decision of the case would turn. Was the testator, at the time he made the alterations in question, merely deliberating as to something he intended to do thereafter? or was he then making his last will? I cannot see how the jury could have been led away from the consideration of that point, by anything which had passed before. If it could have been shown by anything that was said by the jury, that they were really diverted from the consideration of the true point in the case, by the previous observations of the judge, there might have been some ground for Mr. *Knowles's* argument. But there is no suggestion of the kind. It would be extremely dangerous, and highly injurious to the interests of justice, that new trials should be granted upon a speculative surmise that the jury may have been confused or misled by the particular manner in which the judge frames his direction to them in point of law, or the order in which he presents the facts for their decision. [*749]

V. WILLIAMS, J. I am of the same opinion. I can entertain no doubt that the partial alteration of the Yorkshire will in this case operated, in point of law, as a revocation *pro tanto* of the London will. As to what constitutes a duplicate,—I take it to be clear, that, whenever a testator intends to execute a will in duplicate, he intends that each of the documents shall form part of his will. If any authority is wanting for this position, it will be found in the case of *Killican v. Lord* *Par- [*750
ker, 1 Lee's Eccl. Cas. 662, where it was held that a duplicate is a part of a will, and to be considered as a testamentary paper; and Sir G. LEE said, "it was the constant rule to bring into the prerogative court all testamentary papers, and that a duplicate is part of the will." In this particular case, the question has been expressly left to the jury, whether the testator intended that the two documents should form one will in two parts. And the jury found that he did so intend. If such was his intention, no doubt the law enabled him to carry it into effect. There being, then, two instruments existing which together formed the testator's will, the next question is, whether an alteration or obliteration made in one of them, operated as an alteration or obliteration of a similar passage in the other. I think the learned judge was right in holding that it did. A long series of cases has decided such to be the legal effect of such an alteration. This rule, therefore, must be discharged.

TALFOURD, J., was absent.

Rule discharged.

*751] *SANDS and Others v. CLARKE. Dec. 10.

In debt by the payee against the maker of a promissory note payable at "No. 11, Old Slip," the declaration stated, that, "when the said promissory note became due, to wit, on, &c., the plaintiffs were ready and willing in due manner to present the said note to the defendant, at the said No. 11, Old Slip, for payment, and then and there to demand of the defendant payment of the said note, and the plaintiffs would have duly presented the same to the defendant, and demanded payment thereof accordingly, but the defendant was then absent from, and not to be found at, the said No. 11, Old Slip, and had then clandestinely departed and absconded from thence, without leaving or having left any effects at the said place, or any means or provision there for the payment of the said note, nor were there any effects of the defendant at the said No. 11, Old Slip, nor any means or provision there for payment of the said note, and the defendant did not pay the said note when it became due, &c."—

Held, that the declaration failed to disclose a cause of action, by reason of the note not having been presented according to its exigency, and no sufficient legal excuse being shown for the omission.

THIS was an action of debt. The first count of the declaration stated, that the defendant, theretofore, to wit, on the 29th of August, 1845, in parts beyond the seas, to wit, at New York, in the United States of America, made his promissory note in writing, and thereby promised to pay to the plaintiffs, by and under the name, style, firm, and description of Messrs. Sands, Fuller, & Co., at No. 11, Old Slip, 846 dollars, for value received, that is to say, 846 dollars currency at New York, six months after date, which period had elapsed before the commencement of this suit, and then delivered the said note to the plaintiffs: Averment, that, when the same became due, the said 846 dollars currency at New York were, and still are, of great value, to wit, 194*l.* 7*s.* of lawful money of Great Britain; that, afterwards, when the said promissory note became due, to wit, on the 4th of March, 1846, the plaintiffs were ready and willing in due manner to present the said note to the said defendant, at the *752] said No. 11, Old Slip, for payment, and then and there to *demand of the defendant payment of the said note, and they, the plaintiffs, would have duly presented the same to the defendant, and demanded payment thereof accordingly, but the defendant was then absent from, and not to be found at, the said No. 11, Old Slip, and had then clandestinely departed and absconded from thence, without leaving or having left any effects at the said place, or any means or provision there for the payment of the said note, nor were there any effects of the defendant at the said No. 11, Old Slip, nor any means or provision there for payment of the said note; and the defendant did not pay the said note when it became due, &c.

The second count was like the first, on a promissory note between the same parties, dated the 5th of November, 1845, payable at six months after date, for 460 dollars, 80 cents, currency, of the value of 103*l.* 13*s.* 6*d.* of lawful money of Great Britain.

There was also a count upon an account stated.

Special demurrer, assigning for causes,—that it does not appear in the first and second counts of the declaration or either of them, that the said

notes or either of them, were or was presented at No. 11, Old Slip, nor does it appear that the defendant excused or prevented the plaintiffs from presenting the said notes, or either of them, at the said place; and that, the contract of the defendant contained in each of the said notes, being, to pay if presented at the said place, and there being no presentment at the said place, no breach of contract by the defendant appears in the said counts or either of them.

Joinder in demurrer.

Bramwell, in support of the demurrer. The declaration is bad, for want of an averment of presentment of the notes at No. 11, Old Slip, or an excuse for the *omission, if any excuse would have been sufficient. In all cases where there is a condition in a contract, performance or a dispensation, must be averred; and there is no difference in this respect between a contract contained in a promissory note, and a contract of any other description. If performance was prevented by the act of the party, that might have been averred. The declaration alleges that the defendant had clandestinely departed and absconded from the place in question, without leaving any effects there, or any provision for payment of the notes. That, in truth, amounts to nothing. In *Sanderson v. Bowes*, 14 East, 500, it was held that a promissory note of the defendants, promising to pay so much *at their banking-house at W.*, required a demand of payment *there*, in order to give the holder a cause of action if it were unpaid. The like was held in *Dickinson v. Bowes*, 16 East, 110. In *Howe v. Bowes*, 16 East, 112, the Court of Queen's Bench held, that, although, where a promissory note is made payable at a particular place, a demand of payment must be made there, in order to give the holder a cause of action, yet that, if the makers (who have become insolvent) shut up and abandon their shop, that is evidence of a declaration to all the world, of their refusal to pay their notes there. But the Court of Exchequer, upon a writ of error brought, reversed that judgment; *Bowes v. Howe*, 5 Taunt. 30; distinctly holding that a note promising to pay on demand at a particular place, must be presented, and a demand of payment made, at that place, unless the makers discharge the holder from the presentment and demand; that the presentment and demand must be alleged, unless a discharge is shown; and that an allegation that the makers of the note became insolvent, and ceased and *wholly declined and refused then and thenceforth to pay at the place specified any of their notes, does not show a [*753 discharge of presentment and demand: nor can it be intended from the allegation of refusal, that there was a presentment. It clearly is no excuse for the non-presentment, that the maker of the note was not at the place indicated, when the note became due: and nothing is alleged here, from which the court can infer that a presentment there would have been useless, or was impracticable. If the excuse here suggested

were held sufficient, it would be good against an endorser; which can hardly be contended for.

Kennedy, contra. It would be absurd to hold the idle ceremony of presentment necessary, at a place where there are notoriously no means or provision for payment. The argument on the other side amounts to this,—first, that there can be no excuse at all,—secondly, that this declaration does not allege a sufficient excuse. Formerly, the practice was, to allege a presentment, and to give the matter of excuse in evidence: but the modern course of pleading, where there has in fact been no presentment, or no notice of dishonour, is to allege the excuse in the declaration. Of this, *Burgh v. Legge*, 5 M. & W. 418, is an instance. The present case does not rest upon the same loose averments as are found in *Sanderson v. Bowes*, *Dickinson v. Bowes*, and *Howe v. Bowes*: the declaration goes further, and alleges that the defendant had absconded, without leaving any effects at the place where the note was payable, or any means or provision there for the payment of the note. And, the note having been made specially payable at a particular place, there was no necessity for averring a presentment to the maker himself: *De Bergareche v.*

**Pillin*, 3 Bingh. 476, 11 J. B. Moore, 350; *Gibb v. Mather*, 8 *755] Bingh. 214, 1 M. & Scott, 387. In Com. Dig. *Condition* (L. 12), it is said, that, “if a condition be, to do upon request, and he is disabled to perform, there needs no request, for it would be vain:” for which Comyns cites Sir Anthony Mayne’s case, 5 Co. Rep. 21 a, and *Brailsford v. Parsons*, 1 Lutw. 308. The resolution in Sir Anthony Mayne’s case, is, (a) that, “if a man seised of lands in fee, covenants to enfeof J. S. of them, upon request, and afterwards he makes a feoffment in fee of the said lands; now, in this case, J. S. shall have an action of covenant, without request.” (b) In *Hine v. Allely*, 4 B. & Ad. 624, in assumpsit upon a bill of exchange drawn upon “P. P., No. 6, Budge Row,” and accepted by him, an averment that the bill, when due, was presented and shown to P. P. for payment, was held to be supported by proof that the holder went to No. 6, Budge Row, to present it, but found the house shut up, and no one there. [CRESSWELL, J. That case would have been in point, if these notes had been presented at No. 11, Old Slip.] *Terry v. Parker*, 6 Ad. & E. 502, 1 N. & P. 752, virtually decides this case: it was there held, that want of effects in the hands of the acceptor of an accommodation-bill, excuses the endorsee from presenting it for payment, as well as from giving notice of dishonour to the drawer. [WILDE, C. J. Upon the principle that the drawer in that case sustains no damage: he has no right to expect presentment.] *Turner v. Stones*, 1 D. & L. 122, is also an authority to show that a presentment is unnecessary, where, from the circumstances, it must necessarily be

(a) That was the resolution in a case of P. 32 E. 8, in *Fitch. Abr. tit. Barre*, pl. 264, cited in Mayne’s case. *Vide post*, 762.

(b) And see Co. Litt. 221 a.

unavailing. And there are many cases *to show that presentment is not necessary, where the party has no right to expect that it [*756 will produce any fruits; *De Berdt v. Atkinson*, 2 H. Blac. 836; *Hardy v. Woodrooffe*, 2 Stark. N. P. C. 819.

Bramwell, in reply. No case has been cited to impugn the authority of *Sanderson v. Bowes* and *Bowes v. Howe*. [CRESSWELL, J. May it not be that there is an implied promise on the part of the maker that he will make provision for payment of the note when presented at the place indicated?] It may be so. But, here, no breach of such implied promise is alleged; it is not averred that the defendant made any such promise. This is rather like the case of a demand of rent, which must be made at the premises, although they may be shut up. There is no distinct allegation that presentment at No. 11 Old Slip was impossible, or would have been useless. Every word of the declaration is consistent with there having been an agent of the defendant's there ready to pay the note, if it had been duly presented.

Cur. adv. vult.

MAULE, J., now delivered the judgment of the Court.(a)

This case came before the court upon a demurrer to the declaration, and was argued before the lord chief justice, my brother CRESSWELL, and myself; and the judgment which I am about to read was prepared by the lord chief justice.

The declaration contains two counts upon promissory notes. The notes are alike in form, and differ only in amount; and the action is against the maker of the notes, by the payees. In each note, the defendant promised to pay the sum therein mentioned, at the respective dates, at No. 11, Old Slip; the period for which the notes [*757 were drawn, being averred to have expired before the commencement of the action.

Neither of the counts contains any averment of presentment at No. 11, Old Slip, the place where both notes were made payable: but, by way of excuse for the non-presentment, or of dispensation of the duty of presentment, it is averred, in both counts, that, when the promissory notes therein respectively mentioned became due, the plaintiffs were ready and willing to present the said notes to the defendant, at the said No. 11, Old Slip, for payment, and then and there to demand of the defendant payment of the said notes, and the plaintiffs would have presented the said notes, and demanded payment thereof accordingly, but the defendant was then absent from, and not to be found at, the said No. 11, Old Slip, and had then clandestinely departed and absconded from thence, without leaving or having left any effects at the said place, or any means or provision there for the payment of the said notes, nor were there any effects of the defendant at the said No. 11, Old Slip, or any means or provision there, for the payment of the said notes, and the said defendant did not pay the said notes when they became due.

(a) The argument had taken place before WILDE, C. J., COLTMAN, J., and CRESSWELL, J.

To this declaration, the defendant has specially demurred, assigning for cause that it does not appear in the said counts, or either of them, that the said notes, or either of them, were or was presented at No. 11, Old Slip, nor does it appear, that the defendant excused or prevented the plaintiffs from presenting the said notes, or either of them, at the said place, and the contract of the defendant contained in each of the said notes, being, to pay, if presented at the said place, and there being no presentment at the said place, no breach of contract, by the defendant, appears in the first and second counts, or either of them.

*758] *The demurrer came on for argument in Easter term; and, upon the argument, the counsel upon behalf of the defendant relied upon the special causes of demurrer assigned, and contended that it was settled law that a note made payable, in the body of it, at some specified place, must be presented, when due, at that place; and that the declaration must aver the presentment to have been made, or set forth some acts on the part of the maker to excuse the want of presentment; and that the matter set forth in this declaration, did not furnish any such legal excuse or dispensation: and the case of *Bowes v. Howe*, 5 Taunt. 30, was cited as a distinct authority governing the present case.

Upon the part of the plaintiff, it was contended that the facts set forth by way of excuse for the non-presentment of the notes, were sufficient in point of law, because they showed that the presentment, under the circumstances stated, would have been unavailing and useless, and that, by law, conditions to do useless acts were not required to be performed: and *Mayne's case*, 5 Co. Rep. 21 a, was cited as an authority. The plaintiff's counsel also contended that the several cases upon bills of exchange and promissory notes, in which it had been determined that presentment need not be made, or notice given of the dishonour, where no damage *could* be sustained by the omission, were authorities applicable to the present case.

But the court is of opinion that the authorities referred to on the part of the plaintiff, do not govern this case, and that the matter set forth in the declaration, by way of excuse for the non-presentment, is not sufficient; and that the declaration does not, therefore, show any breach of the promise contained in the notes.

It is clear that the presentment of the notes at No. 11, Old Slip, is, *759] by the notes, made a condition *precedent to the defendant's liability to pay; and equally clear that it must be performed before he can be charged, unless the defendant has himself discharged the condition, or dispensed with its performance.

The case of *Bowes v. Howe* is a strong authority for the defendant. That was an action against the makers of certain promissory notes, by which they had promised to pay 5*l.* at Workington Bank; and, in order to excuse the non-presentment, the declaration averred, that, after the making of the note, and before the exhibiting of the bill, the defendant

had become insolvent, and then, and from thenceforth, until and at the time of the exhibiting of the bill, ceased, and wholly declined and refused, to pay at Workington Bank aforesaid, the sum or sums of money specified in the notes. The declaration concluded with the general breach, that the defendants had not paid, although requested. The court of error held that the matter set forth in the declaration did not dispense with the presentment of the notes: and MACDONALD, C. B., who pronounced the judgment, remarked that the alleged declaration by the defendants that they would pay none of their notes, was not made to the plaintiffs, but merely that the defendants had declared generally that they neither could nor would pay any of their notes. This case is a decisive authority to the effect that a declaration of insolvency by the maker of a note, or a general declaration by him that he will not pay any of his notes, will not dispense with the presentment.

The declaration in that case went further than the present, which states that the defendant had absconded when the notes became due; which absconding might have taken place even before the giving of the notes: nor does it appear that No. 11 Old Slip was a place shut up, at which, therefore, no demand *could* be made, or information obtained respecting the defendant. The defendant was not bound to have the money at the Old *Slip before the note was presented. It is decided that the [*760 known bankruptcy of the maker of a note payable at a particular place, will not dispense with the presentment, although in such a case there can be no presumption that the maker possesses the means of payment: and the averment in this declaration states no circumstances which prevented the presentment being made, but simply such as are calculated to create a strong suspicion that the note would not have been paid; which is not enough.

The case of *De Berdt v. Atkinson*, 2 H. Black. 336, was cited on behalf of the plaintiff. That was an action by the endorsee of a promissory note, against the payee and endorser. The defense was, that the note had not been presented to the maker: the court held, that, because the defendant, the payee of the note, had given no value to the maker, it was unnecessary that the note should be presented to the maker: and the case was considered as analogous to that of the drawer of an accommodation bill; and, in such cases, the law-merchant has been held to dispense with presentment and notice of dishonour. But the principle of those decisions has no application to a case like the present, in which presentment of the note, or a dispensation with the presentment by the maker of the note, is clearly necessary. That case, however, has been dissented from, if not distinctly overruled: see the remarks of CHAMBER, J., in *Leach v. Hewitt*, 4 Taunt. 781, *Brown v. Maffey*, 15 East, 216, and *Cory v. Scott*, 3 B. & Ald. 619.

The case of *Turner v. Stones*, 1 D. & L. 122, was also cited by the plaintiffs' counsel. The action was for money had and received, and the

plaintiff sought to recover a sum of 5*l*., which he had given to the defendant, in exchange for a country bank-note, on Saturday, the 14th of January. The bankers made no payments after that *day, and subsequently became bankrupts. On Monday, the 16th of January, the plaintiff returned the note to defendant, who promised to return the money on the Wednesday, but did not, but objected that the note had not been presented at Sheffield. The parties lived at Darlington, a great distance from Sheffield; and the bankers had opened their shop on the Monday for two hours, but made no payments, and, after the two hours, exhibited a placard, announcing that the bank had stopped payment. COLERIDGE, J., distinctly recognised the authority of *Bowes v. Howe*, and treated the question,—whether, as between third persons, the presentment to the maker might be dispensed with, under certain circumstances,—as a distinct question from that of the necessity of presentment, as against the maker of the note. That case is, therefore, no authority applicable to the present.

The case of *Terry v. Parker*, 6 Ad. & E. 502, 1 N. & P. 752, also cited, was a question whether the averment in the declaration, that the bill was accepted for the accommodation of the defendant (the drawer), and that he had no reason to expect that the bill would be paid, nor had sustained any damage by the non-presentment of the bill to the acceptor, was a sufficient excuse for the non-presentment to the acceptor, and the omission of notice to the defendant. The declaration was held sufficient, for the reason before stated: but that case is inapplicable to the present.

Burgh v. Legge, 5 M. & W. 418, was likewise cited: but that case is also inapplicable to this case; the only question being, whether the averment of notice to the defendant, who was sued as endorser of the bills upon which the action was brought, was proved by the evidence of conversations between the plaintiff and the defendant before the bills became *762] due, in which the defendant *told the plaintiff that the bills would not be paid, and requested that he might not be put to the expense of postage to give him notice of the non-payment: the court held that the evidence was not sufficient; and a nonsuit was entered.

In addition to the several cases upon bills of exchange and promissory notes which have been referred to, the plaintiffs' counsel also cited *Mayne's case*, 5 Co. Rep. 25 a.(a) as an authority to prove that useless conditions are not required to be performed: and it was argued that the facts alleged in the declaration showed that the presentment of the notes would have been a useless act, and ought to be held to dispense with the necessity of presentment. The facts of *Mayne's case* exclude the application of the doctrine for which it was cited, to the present case. *Mayne* leased to *Scott* for twenty-one years, and covenanted, that, at any time during the life of *Scott*, upon surrender of his lease, *Mayne* would grant

(a) See *Luxmore v. Robson*, 1 B. & A. 584; *Beswick v. Swindells*, 3 N. & M. 159; 2 M. & G. 746, n. (b).

a new lease for Scott's life; (a) and gave bond to perform the covenants: and, in an action upon the bond, Mayne pleaded that Scott had not surrendered the lease; to which Scott replied that Mayne had granted the land to another person for eighty years: upon which Mayne demurred; and it was held that Mayne had broken his covenant, without any surrender made, inasmuch as he had disabled himself to take the surrender, and to grant the new lease, and therefore it would have been useless for Scott to execute a deed in the form of a surrender, which would have been wholly inoperative: and so, no doubt, the law is—that, if a man binds himself to do certain acts which he afterwards renders himself unable to perform, he thereby dispenses with the performance of conditions precedent *to the act which he has so rendered himself unable to perform. [*763

In this case, the defendant did no act tending to prevent or impede the presentment being duly made: and the court is of opinion that the declaration is defective, and fails to show a cause of action, by reason of the note not having been presented according to its exigency, and no sufficient legal excuse being shown for the omission. There must, therefore, be judgment for the defendant. Judgment for the defendant.

(a) “*Novel lease (not for Scott's life, but) durant le residue des ans.*”

**BELL and Others, Assignees of THOMAS WILLMOTT, a Bankrupt,
v. BIDGOOD. Dec. 8.**

After declaration, in an action adversely brought, and without collusion, the defendant consented to a judge's order for payment of debt and costs forthwith, the plaintiff to be at liberty, in case of default, to sign judgment and issue execution for the amount:—Held, that a judgment signed thereon was a judgment by *nil dicat*, and within the protection of the 1 W. 4, c. 7, s. 7.

THIS was an action of assumpsit upon a feigned issue, framed pursuant to a judge's order made on the 6th of March, 1848, to try whether the execution hereinafter mentioned, was valid against the after-mentioned *fiat*.

The defendant pleaded that the execution was valid against the *fiat*; and upon that plea issue was joined.

The following case was, by consent, stated, under a judge's order, for the opinion of the court:—

Thomas Willmott, up to and at the time of his bankruptcy, carried on the business of a surgeon and apothecary. Before his bankruptcy, and while he carried on his business, Messrs. Bidgood & Co. drew upon Thomas Willmott, on the 7th of July, 1847, a bill of exchange for 38*l.* 12*s.* 9*d.*, payable, four months after *date, to them or their order; which bill the said Thomas Willmott accepted, and Messrs Bidgood & Co. endorsed to Henry Bidgood, the defendant in this action, for

a *bond fide*, full, and valuable consideration. The bill was not paid by Thomas Willmott, at maturity, and is still wholly unpaid.

The defendant, Henry Bidgood, commenced an action, adversely, and not by collusion for the purpose of fraudulent preference, in the Court of Common Pleas, against Thomas Willmott, for the recovery of the amount of this bill. The declaration was duly filed, and notice thereof given to Thomas Willmott, according to the practice of the said court; and, Thomas Willmott having no defence to the said action, the following order was, on the 20th of January, 1848, by consent, made by CRESSWELL, J.:—

“Upon hearing the attorneys or agents for the plaintiff, and the defendant in person, and by consent, I do order, that, upon payment of 38*l.* 12*s.* 9*d.*, the debt for which this action is brought, together with interest from the 10th of November last, and costs, to be taxed as between attorney and client, and paid forthwith, all further proceedings be stayed: And I further order, that, in case default be made in payment as aforesaid, the plaintiff be at liberty to sign final judgment and issue execution for the amount, with costs of judgment and execution, sheriff's poundage, officer's fees, and all other incidental expenses.”

The costs in the said action were, on the 20th of January, taxed at 10*l.* 4*s.* 6*d.* Default was made by Thomas Willmott in payment, pursuant to the said order, of the several sums of 38*l.* 12*s.* 9*d.*, 9*s.* 9*d.* for interest, and 10*l.* 4*s.* 6*d.* for costs, making together 49*l.* 7*s.*

Thomas Willmott did not plead to, or in any way answer, the said declaration. On the 7th of February, *judgment was signed in
*765] the said action, for 49*l.* 7*s.*, under the said order.

On the 9th of February, 1848, a writ of *fi. fa.* was issued by virtue of the judgment, directed to the sheriff of Middlesex, and delivered to them at half past 12 o'clock on the said 9th of February, directing them to levy, &c.

The sheriff, at 2 o'clock in the afternoon of the said 9th of February, seized and took in execution certain goods and chattels of Thomas Willmott, and remained in possession of the same until the 18th of March, when they withdrew, under the authority of the judge's order of the 6th of March, 1848, whereby the sheriff was directed, that, upon payment of 60*l.* by the plaintiffs in this action, into court, they should withdraw from possession; and which sum of 60*l.* was paid accordingly, on the 17th of March, 1848.

On the said 9th of February, Thomas Willmott, being unable to meet his engagements, signed a declaration of insolvency in the court of bankruptcy, under the statute 6 G. 4, c. 16, s. 6, and, on the same 9th of February, at 10 minutes before 3 o'clock, caused the same to be filed in the lord chancellor's office of the secretary of bankrupts.

A *fiat* in bankruptcy, directed to the London court of bankruptcy, was dated and issued on the 10th of February, 1848, against Thomas

Willmott, who was declared a bankrupt on the 11th of February; and the plaintiffs were appointed assignees under the *fiat* on the 25th.

At 4 o'clock in the afternoon of the said 10th of February, the attorney of Thomas Willmott served on the under-sheriff of Middlesex a notice that the *fiat* had issued: and, at a quarter past 2 o'clock on the said 10th of February, the attorney to the *fiat* served on the said under-sheriff, and the officer in possession, notice that *Thomas Willmott had been adjudged a bankrupt, and required them not to sell or [766 remove any of Thomas Willmott's goods, &c.

The question for the opinion of the court is,—Whether the execution was valid against the *fiat*. If the court shall be of opinion that it was valid, judgment is to be entered for the defendant immediately after this cause is decided. If the Court shall be of a contrary opinion, judgment is to be entered for the plaintiffs.

Rogers, for the plaintiffs. The execution was void as against the assignees under the *fiat*. There could be no doubt, if it depended on the 108th section of the 6 G. 4, c. 16. But the question is, whether the execution is within the protection of the 1 W. 4, c. 7, s. 7, which recites, that, by the 6 G. 4, c. 16, s. 108, it is provided "that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or *nil dicit*, shall avail himself of such execution, to the prejudice of other fair creditors, but shall be paid rateably with such creditors; and that, by reason of such provision, plaintiffs have been and may be deterred from accepting a *cognovit actionem*, with stay of execution, whereby the expense of further proceeding in such action might have been and may be saved or diminished:" and, for remedy thereof, enacts "that no judgment signed, or execution issued, after the passing of this act, on a *cognovit actionem* signed after declaration filed or delivered, or judgment by default, confession, or *nil dicit*, according to the practice of the court, in any action commenced adversely, and not by collusion, for the purpose of fraudulent preference, shall be deemed or taken to be within the said provision of the said recited act." It is submitted that it is not within the [767 *protection of that provision. In *Crosfield v. Stanley*, 4 B. & Ad. 87; it was held that the statute did not extend to judgments on warrant of attorney, though given without collusion or intention of fraudulent preference. These consents to judgments have been decided not to be *cognovits* within the 1 & 2 Vict. c. 110, so as to require attestation, as provided by s. 9 of that act: *Baker v. Flower*, 8 M. & W. 670. "That section," says PARKE, B., "applies to a warrant of attorney or *cognovit* given by a party out of court; the present case is only one of a consent to an order, if a judge thinks proper to make one. It is true, such a consent much resembles a *cognovit*; but then it is not one, for, nothing can be done upon it of itself, until a judge's order is made in pursuance of it."

Granger, for the defendant, was not called upon.

MAULE, J. If this is not a cognovit, it is a judgment by *nil dicit*, and therefore clearly within the spirit of the statute 1 W. 4, c. 7, s. 7. The execution is protected, and the defendant is consequently entitled to our judgment.

CRESSWELL, J., and V. WILLIAMS, J., concurring,

Judgment for the defendant.

*768] *MORGAN and Another, Executors of JOHN, Earl of ABERGAVENNY, deceased, v. WILLIAM, Earl of ABERGAVENNY. Dec. 10.

Deer in a park (though an ancient and *legal* park) may be so tame and reclaimed from their natural wild state, as to pass to executors as personal property.

In trover by executors against the heir, for deer in a park, it appeared in evidence that the park was originally about 900 acres in extent, but that, in comparatively modern times, some adjoining land had been thrown into it; that a considerable herd of deer (600 and upwards) had always been kept therein; that the deer were attended by keepers, and fed in the winter with hay, beans, and other food; that the does were watched at falling time, and the fawns marked as they dropped; and that some of the deer were occasionally selected from the herd, by means of dogs, and stalled and fattened for consumption or for sale to venison-dealers. There was also a considerable body of documentary evidence to show that the park had a legal origin.

In his summing up, the judge told the jury, that, by the general law, deer in a park went to the heir-at-law of the owner of the park, but that deer which were tame and reclaimed became personal property, and went by law to the personal representative of the owner of the deer, and not to the heir of the owner of the park: and he left it to them to say whether the place in question was proved by the evidence to have been an ancient park, with the legal rights of a park; telling them, that, if it had been an ancient park, and the boundaries could not now be ascertained, though the franchise might thereby become forfeited in reference to the crown, that would not affect the question between the parties relative to the deer,—that question being, whether the deer were tame and reclaimed, which must be determined by the nature and state of the animals, and of the place in which they were kept, and their mode of treatment: and he then left them, in writing, the following questions,—1. Whether they found for the plaintiffs or for the defendant,—2. Whether they found the place to be an ancient park, with the incidents of a legal park,—3. Whether the boundaries could be ascertained by distinct marks.

The jury, in answer to the second question so put, said they found the place to be an ancient park with all the incidents of a legal park; and, in answer to the third question, that the boundaries of the ancient park could be ascertained. As to the first question, they expressed a desire to abstain from answering it; but, upon being required to say whether they found for plaintiffs or for defendant, they found for the plaintiffs—observing “that the animals had been originally wild, but had been reclaimed:”—

Held, that the direction was correct, and the verdict sufficient in point of law; and that the evidence was such as was proper to be submitted to the jury.

THIS was an action of trover. The first count of the declaration stated that the said John, Earl of Abergavenny, in his lifetime, to wit, on the 11th of *April, 1845, was lawfully possessed, as of his own *769] property, of divers, to wit, 1000 bucks, 3000 does, 1000 fawns, 1000 stags, 1000 harts, 1000 hinds, 1000 red-deer, 1000 fallow-deer, and 1000 other deer, *then being captured and reclaimed from their natural*

*and wild state, and tamed and confined and enclosed in divers, to wit, ten closes of the said John, Earl of Abergavenny, in his lifetime, and the said deer and animals being of great value, to wit, of the value of 10,000*l.*; and, being so possessed thereof, the said John, Earl of Abergavenny, afterwards, in his lifetime, to wit, on the day and year aforesaid, casually lost the deer and animals aforesaid out of his possession, and the same afterwards, and after the death of the said John, Earl of Abergavenny, to wit, on the 18th of April, in the year aforesaid, came to the possession of the defendant by finding: yet the defendant, well knowing the said deer and animals to have been the property of the said John, Earl of Abergavenny, in his lifetime, and of right to belong and appertain to the plaintiffs, as executors as aforesaid, after the decease of the said John, Earl of Abergavenny, but contriving and intending to injure the plaintiffs, as executors as aforesaid, after the decease of the said John, Earl of Abergavenny, in this behalf, did not deliver the said deer and animals, or any of them, nor has he as yet delivered the same, or any of them, to the plaintiffs, as executors as aforesaid, since the decease of the said John, Earl of Abergavenny, although often requested so to do; and the defendant afterwards, and after the decease of the said John, Earl of Abergavenny, to wit, on the said 18th of April, in the year last aforesaid, converted and disposed of the said deer and animals to his, the defendant's, own use.*

The second count stated that the plaintiffs, as executors as aforesaid, afterwards, and after the death of *the said John, Earl of Abergavenny, to wit, on the 18th of April, 1845, were lawfully pos- [*770
 sessed, as of their own property, as such executors as aforesaid, of divers deer and animals, to wit, &c., &c., then being tame and reclaimed from their wild state and nature, and then being captured and kept enclosed and confined in divers, to wit, ten closes, and being of great value, to wit, of the value of 10,000*l.*; and, being so possessed thereof, the plaintiffs afterwards, to wit, on the day and year aforesaid, casually lost the said deer and animals out of their possession, and the same came to the possession of the defendant by finding: yet the defendant, well knowing the said deer and animals to be the property of the plaintiffs, as such executors as aforesaid, and of right to belong and appertain to the plaintiffs, as such executors as aforesaid, but contriving and intending to injure the plaintiffs, as such executors as aforesaid, in this behalf, has not as yet delivered the said deer and animals, or any or either of them, to the plaintiffs, although often requested so to do, and has hitherto wholly neglected and refused so to do, and afterwards, to wit, on the day and year aforesaid, converted and disposed of the said deer and animals to his, the defendant's, own use,—to the plaintiffs' damage, as executors as aforesaid, of 10,000*l.*: Profert of the letters testamentary.

The defendant pleaded,—first, not guilty, except as to the said causes of action as to twelve bucks, one stag, eight does, and four fawns, parcel

of the said bucks, stags, does, and fawns respectively in the declaration mentioned,—secondly, that, except as aforesaid, the said John, Earl of Abergavenny, in his lifetime, was not possessed, neither were the plaintiffs, as executors as aforesaid, after the death of the said John, Earl of Abergavenny, possessed of the said deer or other animals in the declaration mentioned, or any of *them, as of his or their own property *771] respectively,—thirdly, that, except as aforesaid, the said deer and other animals in the declaration mentioned, were not, nor was any of them, captured and reclaimed from their natural and wild state, or tamed or kept confined or enclosed,—fourthly, payment of 85*l.* into court, in respect of the excepted bucks, stag, does, and fawns.

The plaintiffs joined issue on the first three pleas, and took the 85*l.* out of court, in satisfaction *pro tanto*.

The cause was tried before COLTMAN, J., and a special jury, at the sittings at Westminster, after Hilary term, 1847.

The action was brought to recover the value of the deer which were in the park appertaining to Eridge Castle, in the county of Sussex, the principal country residence of the Earls of Abergavenny, at the time of the decease of John, the late earl, on the 12th of April, 1845.

The plaintiffs were Richard Morgan and Azariah Elwood, the executors of the late earl; the defendant was his brother, who, the late earl having died a bachelor, succeeded to the title, and to the family entailed estates.

At the time of the late earl's death, the deer in Eridge Park consisted of five hundred and forty head of fallow-deer, and one hundred head of red-deer, in what was called the Deer Park, twelve bucks in a place called the New Park, and six stags and two bucks which were stalled for fattening.

Eridge Park was an ancient park, forming part of the ancient manor of Rotherfield,—called in Domesday Book *Beredfelle*,—which, it seems, was royal demesne, of the fee of Odo, Bishop of Baieux, brother of William the Conqueror, and theretofore held by the Saxon Earl Godwin. In Domesday Book, it is thus described:—"The land consists of twenty-six carucates in *demesne, four carucates,^(a) and fourteen villeins, *772] with six bordarers, having fourteen ploughs. There are four servi, and wood sufficient to feed fourscore hogs. *There is a park.* In the time of King Edward the Confessor, it was worth 16*l.*; and afterwards 14*l.*; now 12*l.*: and, nevertheless, renders 30*l.*."^(b)

The substance of the evidence given on the part of the plaintiffs was as follows:—

In modern times, Eridge Old Park has consisted of about nine hundred acres, a great portion of which is of a rough, wild description, containing a considerable quantity of fern, brake, and gorse. The New Park adjoining consists of about two hundred acres. Some additions were about forty years ago made to the Old Park, by the removal of portions

(a) About 2400 acres.

(b) *Vide post*, 799 (a).

of the ancient fences, and erecting paling around the land so added. The deer usually had the range of the Old Park, where they were attended by keepers, and fed in the winter with hay, beans, and other food. The does were watched in the falling season, and the fawns marked, as they were dropped, in order to ascertain their age, and to preserve the stock. At times, certain of the deer were selected from the herd, and caught, with the assistance of lurchers muzzled or with their teeth drawn, and turned into an enclosure in the New Park, or into pens or stalls, for the purpose of fattening them for consumption, or for sale to venison-dealers. The ordinary mode of killing them was by shooting. There was a slaughter-house in the park, for preparing and dressing the carcases. Some years since, a great number of deer were brought to Eridge from Penshurst and other places. Deer sometimes, though rarely, escaped from the park, by leaping over the fences. Some of them were described as being very tame, coming close to the keepers when called at feeding times. Witnesses were also called to prove, that, of late years, deer have been *commonly bought and sold for profit, like sheep or other [*773 animals kept for the food of man.

The plaintiffs also put in the will of Henry, Earl of Abergavenny (who died on the 27th of March, 1848), dated the 5th of March, 1839, which contained the following bequest to his eldest son, the late earl:—"And I further give and bequeath unto my said son John, Lord Viscount Nevill, all the wine and other liquors which may be in the messuage or mansion-house called Eridge Castle, and in my house in Berkeley Square, and all my carriages and horses, *and all my deer*, and all such other live and dead stock as shall be in or about the said messuage or mansion-house of Eridge Castle aforesaid, or in and about my house in Berkeley Square aforesaid, or in the parks, pleasure-grounds, plantations, gardens, buildings, offices, and appurtenances, to the same, or either of them, belonging at the time of my decease, or elsewhere," &c.

On the part of the defendant, the conversion was admitted: but it was insisted that Eridge Park was an ancient legal park, and that the deer therein, by the law of the land, were not personal property, but formed part of the inheritance.

For the purpose of showing Eridge to be an ancient park, reference was made to the passage above cited from Domesday Book; and the following documents were put in:—An inquisition taken in the 23d year of the reign of Edward 8, upon the death of Hugh de Spencer;—the will of George Neville, knight, Lord Bergavenny, in the 28 H. 8;—an act of parliament of the 2 & 3 P. & M., "for confirming of the restitution of the heirs male of Sir Edward Nevill, knight," under the limitations of which the family estates of the Earls of Abergavenny are held for an estate in tail inalienable, with a reversion in fee to the crown;—an act of the 85 Eliz. intituled "an act concernynge the lands of Henry, late Lord Bergavenny, deceased," *passed on the occasion [*774

of the marriage of Henry Nevill, the then tenant in tail of the Abergavenny estates, in which there occurs the following description of the park at Eridge, "All those parks or walks in the Forest of Waterdown, in the county of Sussex, called or known by the name of Eridge Park and Fant Pitts (being now made into one park, and heretofore divided into two), with all and singular their and every of their appurtenances;" —an account and survey of the Nevill estates, in the 36 Eliz., making mention of the park of Eridge;—An act of 30 G. 3, intituled "an act to confirm a lease lately made by Henry Nevill, Earl of Abergavenny, of certain entailed mines and other hereditaments in the county of Monmouth, and to enable granting future leases of the said entailed mines and other hereditaments, and also of all other estates of which the said earl is seised as tenant in tail male, under an act of parliament passed in the 2d and 8d years of King Philip and Queen Mary, and under the limitations of the last will of George, Lord Abergavenny, in the said act of Philip & Mary mentioned;" and containing the following exception, "except only the capital messuage or mansion-house now called Eridge Place, in the county of Sussex, and the park called Eridge Park," &c.; —and an act of 6 & 7 W. 4, c. 18, intituled "An act to enable the granting of leases of certain parts of the estates and hereditaments of which the Right Hon. Henry Nevill, Earl of Abergavenny, is seised as tenant in tail male under an act passed in the second and third years of the reign of King Philip and Queen Mary, and under the limitations in the will of George Lord Abergavenny in the said act of Philip and Mary mentioned;" and also several leases at various times granted by the successive Earls of Abergavenny, of portions of the property, under these powers.

Several witnesses were also called, to prove the state of the Old Park, and of the deer therein. They stated, *that, although there had
*775] been recent additions to the ancient park, the old boundaries were still to be seen; and that the deer were generally in a very wild state.

For the plaintiffs, it was submitted, that, although Eridge Park might originally have been a park in the strict sense of the term, having all the incidents of a legal park,—vert, venison, and enclosure,—it had ceased to bear that character, by reason of the manner in which it had in modern times been dealt with; it being essential that the boundaries of an ancient park should be strictly preserved: and that, by the mode in which the deer in question had been treated, they had ceased to be *feræ naturæ*, and had become mere personal property, like sheep or any other domestic animals.

The learned judge, in his summing up, told the jury, that the main question for them to consider, was, whether the deer in dispute were to be looked upon as wild, or as tame and reclaimed; and that it had been laid down by the best authorities upon the subject, that deer in a park, conies in a warren, and doves in a dove-cote, generally speaking, go with

the inheritance to the heir,^(a) or, in a case like the present, where the estate does not go exactly in heirship, but under the limitations of an act of parliament, to the person next entitled under the parliamentary settlement; but that the rule was subject to this exception,—that, if the animals are no longer in their wild state, but are so reduced as to be considered tame and reclaimed, in that case they go to the executors, and not to the heir. He then proceeded, in substance, as follows:—A large body of evidence has been laid before you, for the *purpose of satisfying you that Eridge Park was an ancient park, having [*776 all the incidents and privileges of an ancient park, to which rights formerly appertained which are now comparatively valueless. But the question will not turn upon whether Eridge was or was not an ancient park; though, at the same time, it may be desirable, if you are able to form an opinion upon it, that you should state it. Undoubtedly, one who has an ancient park, having the rights and incidents of a legal park, ought to preserve the boundaries within which he claims to exercise those rights: and probably there can be no doubt, that, if the boundaries are so effaced that they cannot be distinctly ascertained, his franchise, as against the crown, would be lost. But that is a matter which does not, as it seems to me, very much concern the question now before us; because, though some rights might be forfeited by the destruction of the ancient boundaries, still, the nature of the animals would remain unchanged. That deer, when caught, and enclosed in a pen, would pass to the executors, there can be no doubt; and, probably, if animals of this sort were enclosed in a small field, well fenced round, and well kept, it could hardly be said that they were not so far reduced into immediate possession, as to become personal property. It is quite admitted, upon the evidence on the one side and on the other, that there have been, from time to time, additions made to what formerly constituted Eridge Park; though there is some difference as to the quantity. And, observing upon the documentary evidence put in on the part of the defendant, the learned judge said,—with reference to the extract from Domesday Book, and to the inquisition taken in the reign of Edward the Third, upon the death of Hugh de Spencer,—that, at that period, when the forest laws were in full vigour, whenever a “park” was mentioned, it must be understood to *mean a *legal* park. And he concluded by asking the opinion of the jury upon two questions which he gave [*777 them in writing,—first, whether Eridge Park was an ancient park, with all the incidents of a legal park,—secondly, whether the boundaries could be ascertained by distinct marks: telling them that the principal question

(a) To this part of the ruling, the plaintiffs' counsel excepted,—contending that the rule of law is, not that deer in a park pass with the inheritance, but that they are not the subject of property at all whilst in a wild state; and that the mere circumstance of their being in an enclosed park made them personal property, unless the enclosure was a park with all the rights and incidents of an ancient and legal park.

was, whether they found for the plaintiffs or for the defendant, the others being only incidental.

The jury retired, and, after a protracted absence, returned into court, the judge having left; when, upon the associate asking them whether they found for the plaintiffs or for the defendant, the foreman answered,—"We find,—first, that it was originally a legal park, but that its boundaries have been altered and enlarged,—secondly, we find that the deer have been reclaimed from their natural wild state. What the effect of that opinion is, we are not lawyers enough to say."

The associate declining to receive their verdict in that form, the jury again retired, and, after a short absence, returned into court, the foreman (addressing the associate) saying,—“You may take it in the first instance as a verdict for the plaintiffs.” The associate then asked,—“Do you find that there was an ancient park, with the incidents of a legal park?” To which the foreman answered,—“We find that it was originally a legal park, but that its boundaries have been altered and enlarged.” Associate,—“Do you find that there was an ancient park, with the incidents of a legal park?” Foreman,—“Yes.” Associate,—“Do you find that there were distinct marks by which the boundaries could be ascertained?” Foreman,—“Yes, there were.”

The verdict was accordingly entered for the plaintiffs.

Talfourd, Serjt., in the following Easter term, obtained a rule nisi for *778] a new trial, on the grounds,—“first, that there had been no complete finding by the jury, they not having distinctly answered the real question which was submitted to them, viz. whether the deer were wild or reclaimed;—secondly, that the learned judge misdirected the jury, in presenting the case to them as if the existence or non-existence of Eridge Park, with all the legal incidents of a park, was a mere collateral question, whereas it was of the very essence of the inquiry; *Co. Litt.* 8 a; *The Case of Swans*, 7 *Co. Rep.* 17 b; *Davies v. Powell*, *Willes*, 46;—thirdly, that there was no sufficient evidence to warrant the finding.

Humphry, *Channell*, Serjt., and *Bovill*, in Easter term, 1848, showed cause. There is no pretence for saying that the jury did not by their verdict dispose of the substantial question which was presented to them by the learned judge, viz. whether the deer in Eridge Park were wild, or tame and reclaimed. The jury were distinctly told, that, as they found that question one way or the other, their verdict must be for the plaintiffs or for the defendant: and they found for the plaintiffs,—and, further, they expressly said that they found that the deer had been reclaimed from their natural wild state.

The objection to the learned judge's direction, in substance, is, that he ought not to have left it to the jury to say whether the deer were reclaimed or not, but whether they were kept in a place having the incidents of a legal park. It is submitted that the direction was cor-

rect. The real question to be considered is, whether the deer were in such a state as to be the subject of property: *Mallooke v. Eastly*, 8 Lev. 227. In *The Case of Swans*, it is said: "A man hath not *absolute property in anything which is *feræ naturæ*, but in those [*779] which are *domitæ naturæ*. Where a man hath savage beasts *ratione privilegii*, as, by reason of a park, warren, &c., he hath not any property in the deer, or conies, or pheasants, or partridges; and therefore, in an action *quod parcum, warrennum, &c., fregit et intravit*, et 3 *damas, lepores, cuniculos, phasianos, perdices, cepit et asportavit*, he shall not say, '*suos*,' for, he hath no property in them, but they do belong to him, '*ratione privilegii*,' for his game and pleasure, so long as they remain in the privileged place; for, if the owner of the park dies, his heir shall have them, and not his executors or administrators, because, without them, the park, which is an inheritance, is not complete." The law there laid down, is not disputed. So, in *Com. Dig. Biens (B.)* it is said, (a) that "deer in a park, conies in a warren, and doves in a dove-house, go with the inheritance to the heir." Again, in *Biens (F.)*, it is said: "In things which are *feræ naturæ*, none can have an absolute property; as, in deer, conies, &c. Yet a man may have a qualified or possessory property in them; as, if deer, &c., are tame. So, if the possession be *ratione privilegii* only, he has no property in them; as, if deer are in a park, conies in a warren, &c." (b) The question underwent much discussion in *Davies v. Powell, Willes*, 46, where *WILLES, C. J.*, says, "I do admit that it is generally laid down as a rule, in the old books, that deer, conies, &c., are *feræ naturæ*, and that they are not distrainable; and a man can only have a property in them *ratione loci*. And therefore, in *The Case of Swans*, and in several other books there cited, it is laid down as a rule, that, where a man brings an action for chasing and taking away deer, hares, rabbits, &c., he *shall not [*780] say '*suos*,' because he has them only for his game and pleasure, *ratione privilegii*, whilst they are in his park, warren, &c. But there are writs in the Register, fo. 102, a book of the greatest authority, and several other places in that book, which show that this rule is not always adhered to. The writ in fo. 102 is '*quare clausum ipsius A. fregit et intravit, cuniculos suos cepit*.' The reason given for this opinion, in the books, why they are not distrainable, is, that a man can have no valuable property in them. But the rule is plainly too general; for, the rule in *Co. Litt.* is extended to dogs; yet it is clear now that a man may have a valuable property in a dog. Trover has been several times brought for a dog, and great damages have been recovered. Besides, the nature of things is now very much altered, and the reason which is given for the rule, fails. Deer were formerly kept only in forests or chases, or such parks as were parks either by grant or prescription, and were considered rather as things of pleasure than of profit: but now they are frequently

(a) Citing *Co. Lit.* 8 a, and 1 *Roll. Abr.* 916, l. 50.(b) Citing 7 *Co. Rep.* 17 b.

kept in enclosed grounds which are not properly parks, and are kept principally for the sake of profit; and therefore must be considered as other cattle." In Williams on Executors, 4th edit. vol. i., p. 591, it is said: "The animals which a man has *ratione privilegii*, are considered as incident to the freehold and inheritance, and do not pass to the executor or administrator. Thus, deer in a park (i. e. as it should seem, in a park properly so called, which must be either by grant or prescription), conies in a warren, doves in a dove-house, will not go to the executor or administrator; and the reason assigned by Lord Coke,^(a) is, because, without them, the inheritance would be incomplete. Another and more obvious reason *781] mentioned by Lord Coke, in the same case, is, that the deceased had not any property in them." Assuming Eridge Park to have been a park in the strict legal sense, the direction of the learned Judge to the jury was free from objection. And, supposing it not to have been a legal park, the executors are, beyond all doubt, entitled to recover. If it were not a legal park, the mere act of enclosing and fencing in the deer, was exercising a dominion over them, which prevented their being considered as being *feræ naturæ*. That this place had lost its legal character and existence as a park, before the late earl's time, is clear from all the evidence on both sides. Vert, venison, and enclosure are essential incidents of a legal park. [MAULE, J. By that you understand, *wild* deer, feed, and enclosure.] Precisely so. [MAULE, J. You say that *wild* deer in a legal park go to the heir. To whom would *wild* deer in a usurped park go?] They would be *nullius in bonis*. By altering or not keeping up the ancient enclosures, or by the destruction of all the deer therein,—Withers v. Iseham, Dyer, 70 a, Sir Charles Howard's case, Cro. Car. 59,—the place becomes disparked. Lord Coke says (Co. Litt. 58 a): "If the tenant of a dove-house, warren, parke, vivary, estanges, or the like, do take so many, as such sufficient store be not left as he found when he came in, this is waste; and, to suffer the pale to decay, whereby the deer is dispersed, is waste." The like is laid down by MANWOOD, J., in Vanvasor's case, 2 Leon. 222, and by Lord HOBART, in Cowper v. Andrews, Hobart, 39. Lord Coke, commenting on the word "*Parke*," in Litt. § 378, says (Co. Litt. 233 a): "This should be written *parque*, which is a French word, and signifieth *782] that which we vulgarly call a parke, of the French *word *parquer*, to imparke or enclose. It is called in Domesday, *Parcus*. In law, it signifieth a great quantity of ground enclosed, privileged for wild beasts of chase, by prescription, or by the King's grant. A forest and chase are not, but a *parke must be, enclosed*." The same learned author, in 2 Inst. 199, observing upon the word "park," in the stat. of West. 2, c. 20, says: "This is understood of a lawful park, whereunto three things are required,—1. A liberty, either by grant, as is aforesaid, or by pre-

(a) Co. Litt. 8 a; 7 Co. Rep. 17 b.

scription;—2. Enclosure by pale, wall, or hedge—And 3. Beasts savages of the parke.” Again, in 4 Inst. 317, he says: “Seeing the jurisdiction of the forest is local, the law of the forest hath provided that the forest should be enclosed by metes and bounds, which indeed are the enclosure of the forest; for, as parks are enclosed with wall, pale, or hedges, so forest and chases are enclosed by metes and bounds; and, as a *parke cannot be a parke without such an enclosure in deed*, as is aforesaid, so it can be neither forest nor chase without an enclosure in law, that is, by metes and bounds.” In *The King v. Sir John Byron, Sir John Bridgman*, 23, 26,—in a *quo warranto*, “for that the defendant for a year past hath used and yet doth use, without any warrant, within the manor of Colswick, in the county of Nottingham, within the bounds of the King’s forest of Sherwood, and within the regnards of the same forest, to have a park within the said manor, with a pale, hedge, and ditch enclosed, being two hundred acres of pasture, and a hundred acres of wood, within the said park, *et ad venandum, capiendum, occidendum, et opportandum*, in the said park and two hundred acres of pasture and a hundred acres of wood, *omnes et omnimodas damas domini Regis forestæ suæ prædict. in parcum *prædict. et prædict. 200 acr. pasturæ et 100 acr. bosci aliquo tempore venand., nec aliquæ aliæ personæ quæcunq. intromittantur ad venandum et fugandum intra parcum prædictum et 200 acr. pasturæ et 100 acr. bosci, sine licentia defendentis*,”—the chief justice says: “I agree that one may have a park within a forest, by prescription or by grant; but then the same ought to be kept so enclosed that the beasts of the forest cannot enter into the park, which if not done, it is a *forfeiture of the liberty of the park*; and so it is, if he have a salterie, or deer-leap; for, *the nature of a park is to be enclosed*; and in 10 H. 7, 6,(a) it is said that a park consists of soile, enclosure, and game. And in the 15 Edw. 8, Thomas, Earl of Lancaster, lord of a forest, did grant leave to one John Harrington, to make a park within the said forest; and there it is adjudged, that, if the grantee does so slightly enclose the park, so that the forest beasts may get in there, that it is a forfeiture, and the lord of the forest may enter and take the deer.”(b) So, in *Com. Dig. Chase (B.)*, it is said:(c) “A chase is the same liberty as a park, save that it is not enclosed.” (C.) “A park is a territory enclosed, which has a privilege for beasts of chase, by prescription or the King’s grant.(d) And the owner may dispark his park, if he grants or destroys all the venison, vert, or enclosure.”(e) The same doctrine is to be found in 2 Bl. Comm. 88, and in Chitty’s *Prerogatives of the Crown*, 140, 141. Reliance will probably be placed, on the part of the defendant, upon the case of

(a) M. 10, H. 7, fo. 6, pl. 12.

(b) And see *Manwood’s Forest Laws*, 3d edit. p. 90.

(c) Citing *Manw.* 52.

(d) Citing *Co. Litt.* 233 a, 1 Inst. 199, *Sir J. Bridgman*, 26.

(e) Citing *Sir Charles Howard’s case*, *Cro. Car.* 59.

Leicester Forest, Cro. Jac. 155, where Sir Edward COKE said—"it had been adjudged that the non-user of a fair or market, *or courts, or such
 *784] like liberties, wherein the subjects have interest for their common profit or common justice, is cause of seizure of them: but the non-user of parks or warrens, or such like, which are to the profit only or pleasure of the owner, is not any cause of their loss or forfeiture." But that was the case of a park in a forest. In Manwood's Forest Laws, edit. 1665 (8d) c. 1, s. 5, p. 52, it is said: "As a forest, in his own proper nature, is the most highest franchise of noble and princely pleasure that can be incident unto the crown and royal dignity of a prince, so the next in degree unto it, is, a liberty of a franke chase. A chase in one degree is the self same thing that a park is; and there is no diversity between them, save only that a park is enclosed, and a chase is always open, and not enclosed." In Cruise's Digest, Vol. III., Title xxviii. *Franchises*, pl. 15, 16, p. 245, it is said: "A park is an enclosed chase, extending over a person's own grounds, privileged for beasts of venery, and beasts of forest and chase, by the King's grant or prescription. And it appears from the *Ordinatio de Libertatibus perquirendis*, 27 Edw. 1, that those who would purchase a new park should have writs of inquiry out of Chancery, and there make fine for the park having. And, in Madox's History of the Exchequer, there is an instance of a person being fined forty marks for making a park without the King's license. To a park, three things are necessary,—1. A grant from the crown,—2. Enclosures by pale, wall, or hedge,—3. Beasts of park, such as buck, doe, &c. And, where all the deer are destroyed, it shall no more be accounted a park; which consists of vert, venison, and enclosure; for, if it be determined in any of these, it is a total disparking." So, in Bae. Abr. *Game*, it is said: "The wild animals, such as deers, hares, foxes,
 *785] *&c., are understood to be those which, by reason of their swiftness or fierceness, fly the dominion of man; and in these no person can have a property, unless they be tamed or reclaimed by him: and, as property is the power that a man hath over any other thing for his own use, and the ability that he has to apply it to the sustentation of his being, when the power ceases, his property is lost; and, by consequence, an animal of this kind which after my seizure escapes into the wild common of nature, and asserts its own liberty by its swiftness, is no more mine than any creature in the Indies, because I have it no longer in my power or disposal. Hence, it appears, that, by the common law, every man had an equal right to such creatures as were not naturally under the power of man, and that the mere caption or seizure created a property in them. By immediate manuecaption, or taking them and killing them, they belong to such person, in the same manner as any other chattels, and cannot be violated from him, since the first seizure and caption was sufficient to vest the property of them in him. By taking and taming them, they belong to the owner, as do all the other tame animals, so long as they continue in this condition, that is, as long as they can be considered to have the

mind of returning to their masters ; for, while they appear to be in this state, they are plainly the owner's, and ought not to be violated : but, when they forsake the houses and habitations of man, and betake themselves to the woods, they are then the property of any man. Another way of gaining property in them, is, by *enclosure*, and then the beasts must be understood to be mine, as the profits of the soil itself are, and they can no more be taken and carried off than any other profits of the land : and, therefore, if deer be enclosed in a park or paddock, conies in a field or warren, they become so my own that no man ought to kill or take *them away. And, since in this case it is the enclosure only that [*786 retains them (for, take away the enclosure, and they are in their natural liberty), therefore the party is said to have right as he hath to any other profits there enclosed, and a distinct and independent right in every animal." "An action of trespass may be brought for taking a man's deer in a park or chase, or conies in his warren, for, the law takes notice that they are enclosed, because these are the proper enclosures for that purpose ; and, consequently, those beasts are not in their natural liberty, and therefore the property is in the plaintiff." [CRESSWELL, J. That is not quite accurate, because a *chase* is unenclosed.] Much learning upon this subject is to be found in the judgment of BAYLEY, J., in *Hannan v. Mockett*, 2 B. & C. 924, 4 D. & R. 518, where most of the authorities upon the subject were considered. Here, the evidence clearly showed that the ancient enclosure of Eridge Park had not been preserved, and consequently that a condition of the presumed grant had not been observed : and the forfeiture of the franchise is not cured by the finding of the jury, that the old boundaries were still ascertainable. In the judgment already adverted to in *Davies v. Powell*, WILLES, C. J., says : "When the nature of things changes, the rules of law must change too. When it was holden that deer were not distrainable, it was because they were kept principally for pleasure, and not for profit, and were not sold and turned into money, as they are now. But now they are become as much a sort of husbandry, as horses, cows, sheep, or any other cattle. Whenever they are so, and it is universally known, it would be ridiculous to say that, when they are kept merely for profit, they are not distrainable, as other cattle, though it has been holden that they were not so when they were *kept only for pleasure. The rules concerning personal [*787 estates, which were laid down when personal estates were but small in proportion to lands, are quite varied, both in courts of law and equity, now that personal estates are so much increased, and become so considerable a part of the property of this kingdom. Therefore, without contradicting the reasons which are laid down concerning this matter in the ancient books, and without determining anything with respect to deer in forests and chases, or *parks properly so called*, concerning which we do not think it necessary to determine anything at present, we are all of opinion that we are well warranted by the pleadings to determine that

these deer, under the circumstances in which they appear to have been at the time when this distress was taken, were properly and legally distrained for the rent that was in arrear." The opinion of the jury in this case coincides exactly with that of the judges in that case.

Talfourd and *Byles*, Serjts., and *Willes*, in support of the rule. There has been no satisfactory finding by the jury. The simple question left to them was, whether these deer were tame and reclaimed, or wild: the other two questions were put to them rather for the future guidance of the court *in banco*. It is by no means clear that the jury were unanimous upon the first question; it may be doubted whether their hesitation arose from the effect of their answers to the two other questions, or upon the answers themselves. [MAULE, J. The learned judge told the jury to find for plaintiffs or defendant, as they found that the animals were tame or wild: and they found for the plaintiffs. Surely that was a sufficient finding.]

The question whether the animals were wild, or tame and reclaimed, was submitted to the jury entirely upon *the state of the animals themselves, and the condition of the enclosure. That, it is submitted, was not correct. The question which ought to have been presented to the jury, was excluded, viz. whether Eridge Park was a place which still retained all the incidents of a legal park, or whether it had become disparked by reason of the alterations which appeared to have been made in its boundaries. It is clear, from the old authorities which have been cited, that deer in a legal park go to the heir, and not to the executor. They form, as Lord Coke says, the ornament of the inheritance, which would be incomplete without them. It is said on the other side, that the legal incidents of a park, properly so called, are, vert, venison, and enclosure; and that the destruction of either of these, *ipso facto* operates as a destruction of the franchise. If venison be indispensable to the subsistence of the franchise, it would be strange, indeed, if it should be held to be destroyed, unless each successive possessor thought fit to bequeath the deer to the person next entitled to the inheritance. And yet such is the inevitable result of the argument on the other side. It is contended, upon the supposed authority of some *obiter dicta* in *Davies v. Powell*, that deer no longer possess the characteristics which marked them formerly. That, however, is begging the whole question. It is further contended that the unauthorized extension of an ancient park, destroys the whole franchise. But for that no authority was cited. [WILDE, C. J. Suppose the park were greatly extended, and the number of deer therein proportionately increased, would the heir be entitled to claim the whole herd, by reason of the original existence of the more limited franchise?] It might be a question for the jury, whether the deer were increased to an unreasonable extent. Additions to the stock go to the heir: Co. Litt.

8. Are the rights of the succeeding tenant in tail to be affected *789] by his predecessor's extension of the enclosure? In the case

of Leicester Forest, Cro. Jac. 155, it was resolved by all the court "that parks being laid open to forests for forty years, may yet be enclosed again; and they may kill any deer that come therein." [MAULE, J. It may be that the tenant in tail would be a wrong-doer, in prostrating fences, so as to give the deer a larger circuit than he had lawful right to.] It may be that the Crown might complain of the additions made to the park: but it concerns not the subject. [MAULE, J. *Wild deer in a park, no doubt, go to the heir. Do you contend that reclaimed deer which are kept in a legal park, also go to the heir?*] They do, provided they have the range of the park, as the deer in question had. [WILDE, C. J. What would be a reclaiming of deer in a park, except what was done with the deer in this case?] Justinian's Institutes, Lib. II., tit. I., § 12, contains all that is worth looking at out of the law of this country, upon this subject:—"Ferae igitur bestiae, et volucres, et pisces, et omnia animalia quae mari, caelo, et terra nascuntur; simul atque ab aliquo capta fuerint, jure gentium statim illius esse incipiunt: quod enim ante nullius est, id, naturali ratione, occupanti conceditur: nec interest, feras bestias et volucres utrum in suo fundo quis capiat, an in alieno. Plane, qui alienum fundum ingreditur, venandi, aut aucupandi gratia, potest à domino, si is praeviderit, prohiberi ne ingrediatur. Quicquid autem eorum ceperis, eo usque tuum esse intelligitur, donec tui custodiâ coercetur. Cum vero tuam evaserit custodiam, et in libertatem naturalem sese recipit, tuum esse desinit, et rursus occupantis fit. Naturalem autem libertatem recipere intelligitur, cum vel oculos tuos effugerit, vel ita sit in conspectu tuo, ut difficilis sit ejus persecutio." There is a marked difference between the Roman law and the law of this country upon this *subject. "In the view of the Romans," says Dr. Ignatius Kauffman, in a note to the 12th edition of Professor Mackeldey's Compendium of Modern Civil Law, p. 277, "*animalia fera*, or wild weasts, were *res nullius*; hence, the property in them ceased as soon as they had made their escape. The property in *animalia mansueta*, or tamed animals, *e. g.* deer, pigeons, peacocks, bees, or a tamed bear, is lost as soon as they have returned to their natural wild state, and have escaped from our sight (*cum oculos effugerint*). *Animalia mansueta*, *i. e.* animals whose nature renders them familiar with man, as *e. g.* domestic animals, fowls, &c., are objects of private property, and consequently are not acquired by occupancy. At the present day, in Germany, the right of occupancy, as far as relates to hunting, fishing, and fowling (all but the right to catch butterflies and cockchafers), is monopolized by the state, the princes, the nobility, and here and there a private proprietor. The romantic period of occupancy has vanished for ever, along with the kindred simplicities of the golden age." In 1 Roll. Abr. *Dismes* (C), pl. 5, (a) it is said: "Si home ad phesants, et eux conserve deins un enclose bois, et clipp les wings del phesanta, et del eggs hatch et educate

jeune phesants, nul dismes aerra paye de ceux eggs ou jeune phesants, pur ceo que ils ne sont reclaime, mes continue *ferre naturee*, et voellent vaer hors del enclosure si lour wings ne fueront clipp.”(a) In Liford’s case, 11 Co. Rep. 50 a, it is said: “It is true, that an integral part, or thing appendant in possession, cannot be parcel, &c., of a reversion expectant upon an estate for life, as has been said; but the trees (as has been often said) are growing out of the inheritance, and attendant upon *791] it; as, by a grant of the reversion, the *charters and evidences shall pass as things attendant upon the inheritance, and in truth they are the sinews of the inheritance. So, if I have a manor in which there is a park and fish-ponds, and I lease the manor, except the game of deer, and the fish, and afterwards I grant over the reversion, the grantee shall have the deer and the fish, as things attendant upon the inheritance; so not only those which have vegetative life, but all those which have sensitive life, shall go with the inheritance.” The reason given by Lord MANSFIELD, in *Lawton v. Salmon*, 1 H. Blac. 260, n., 3 Atk. 15, n., why salt-pans go to the heir, and not to the executors, is, that “*The inheritance cannot be enjoyed without them: they are accessories necessary to the enjoyment and use of the principal.*” Much learning on the subject of parks, whether in forests or elsewhere, is to be found in *Manwood*, 224, and also in *Com. Dig. Chase* (C). [WILDE, C. J. Is not the result this,—that a park must be enclosed at all events, if in a forest, so as to keep the king’s deer out?] That is probably so. A partial destruction of the enclosure, however, will not destroy the franchise. In *Hooper v. Andrews*, 1 Roll. Rep. 120, S. C. per nom. *Cowper v. Andrews*, Hobart, 39, *WARBURTON, J.*, says: “Un parke consist sur deere et inclosure; si tout le deere morust, uncore si sont restore arere, le parke continue.” The learned judge, in this case, should have directed the jury to take into their consideration the circumstance of this being a *legal* park, in order to enable them to determine the question, and the only substantial one, which he did leave to them, viz. whether the deer were tame and reclaimed, or otherwise. If it was a legal park, it would be for the jury to say whether or not the deer retained so much *792] of their original wild character as was *consistent with their enclosure in such a place, and with the exercise of such acts of ownership as were necessary to enable the owner of the inheritance for the time being to enjoy them as part of his inheritance. It ought not to be placed in the power of a jury in this manner to destroy a franchise.

Cur. adv. vult.

MAULE, J., now delivered the judgment of the court:—

This case was argued in Easter term, 1848, before lord chief justice WILDE, and my brothers COLTMAN and CRESSWELL, and myself. In the absence of the lord chief justice, I now proceed to pronounce the judg-

(a) *Winbroke v. Evans*, 11 Car.

ment, which has been prepared by him, and in substance assented to by us.

This was an action of trover brought to recover damages for the conversion of a number of deer.

The declaration contained two counts. The first count stated that the testator, in his lifetime, was possessed of a certain number of bucks, does, and other descriptions of deer, being captured and reclaimed from their natural wild state, and confined in the close of the testator; and that the plaintiffs, after his death, were possessed as executors; and that the defendants afterwards converted the deer, &c. The second count stated that the plaintiffs, as executors, were possessed of the like quantity of deer, which the defendant had converted,—to the damage of the plaintiffs.

The defendant,—except as to a certain number of bucks, does, and fawns,—pleaded, not guilty, to the whole declaration; and, secondly, that the testator was not possessed, nor were the plaintiffs, as his executors, possessed, of the deer, as alleged;—thirdly, that, except as to a certain number of bucks, does, and fawns, the deer alleged in the declaration were not captured, *reclaimed, and tamed, or kept confined in enclosed grounds, as alleged:—lastly, as to the excepted bucks, [*798 does, and fawns, the defendant paid the sum of 85*l.* into court.

Issue was joined on these pleas.

The cause was tried before the late Mr. Justice COLTMAN, at the sittings in Middlesex after Hilary term, 1847, when the jury found a verdict for the plaintiffs upon the issues—testator possessed—plaintiffs possessed—and that the deer were tame and reclaimed.

A rule nisi was afterwards obtained by the defendant, in the following Easter term, to show cause why there should not be a new trial, upon the ground of misdirection, that there had been no sufficient verdict found by the jury, and that, if a sufficient verdict had been found, it was contrary to the evidence.

Several questions arose upon the trial,—first, whether the land called Eridge Park, in the county of Sussex, was an ancient legal park,—secondly, whether it continued to be a legal park, or whether it had become disparked, by the addition of other lands to the original park, and by the removal, decay, or destruction of the fences, so as to destroy the evidence of the boundaries of such ancient park; and whether the deer kept in such park had been tamed and reclaimed.

In support of the defendant's case, various ancient documents were given in evidence, to establish that the place in question was an ancient legal park, and that, from a very early period, down to the time of the death of the testator, there had always been a considerable herd of deer maintained in the park. And it was also proved that the place in question, consisting of upwards of seven hundred acres of land, was in many parts of a very wild and rough description. It also appeared by the

*794] evidence that certain lands had been added to the *original park ; and there was some contrariety of evidence in regard to the state of the fences.

It was also proved that a considerable quantity of deer had the range of the park ; and that some were tame, as it was called, and others wild. What in particular the witnesses meant by the distinctions of tame and wild, was not explained : but it rather seemed that their meaning was, that some were less shy and timid than others. It appeared that the deer very rarely escaped out of the boundaries ; that they were attended by keepers, and were fed in the winter with hay, beans, and other food ; that, a few years back, a quantity of deer had been brought from some other place, and turned into Eridge Park ; that the does were watched, and the fawns, as they dropped, were constantly marked, so that their age at a future time might be ascertained ; that, at certain times, a number of deer were selected from the herd, caught with the assistance of dogs, and were put into certain parts of the park, which were then enclosed from the rest, of sufficient extent to depasture and give exercise to the selected deer, which were fattened and killed, either for consumption, or for sale to venison dealers ; that the deer were usually killed by being shot ; and that there was a regular establishment of slaughter-houses, for preparing and dressing them for use.

Such being the general effect of the evidence, the learned judge stated to the jury, that, by the general law, deer in a park went to the heir-at-law of the owner of the park ; but that deer which were tame and reclaimed became personal property, and went by law to the personal representative of the owner of them, and not to the heir of the owner of the park in which they were kept. And the learned judge left it to the jury, whether the place in question was proved by the evidence to have been *795] an ancient park, with the legal rights *of a park ; and told them, that, if it had been an ancient park, and the boundaries could not now be ascertained, that the franchise might be forfeited in reference to the crown, but that that would not affect the question between the parties relative to the deer,—that question being, whether the deer were tamed and reclaimed ; which must be determined with reference to the state and condition of the animals, the nature of the place where they were kept, and the mode in which they had been treated : and the learned judge stated in writing the questions to be answered by the jury, which were,—first, whether they found for the plaintiffs, the executors, or for the defendant, Lord Abergavenny,—secondly, whether they found the place to be an ancient park, with the incidents of a legal part,—thirdly, whether the boundaries could be ascertained by distinct marks.

The jury answered, that they found the place to be an ancient park, with all the incidents of a legal park,—secondly, that the boundaries of the ancient park could be ascertained. And the jury expressed a wish to abstain from finding for either plaintiffs or defendant ; but, upon being

required to do so, they found a verdict for the plaintiffs, and stated that the animals had been originally wild, but had been reclaimed.

The rule came on for argument in Easter term, 1848; and it appeared, upon the discussion, that the objection that no sufficient verdict had been found by the jury, had been urged upon a misapprehension of what the jury had said. It was supposed that the jury had not found, in terms, for either plaintiffs or defendant, but merely had answered the questions put to them: but it appeared, upon inquiry, that the jury had been required to find a verdict for the plaintiffs or for the defendant, in addition to answering the questions; and that they accordingly returned a verdict for the plaintiffs.

*The second objection was, that the judge had misdirected the jury: and it has been contended, in support of that objection, [*796 that the judge must be held to have misdirected the jury, in having omitted to impress sufficiently upon them the importance of the fact of the deer being kept in an ancient legal park.

But the judge *did* distinctly direct the attention of the jury to the fact of the deer being in a legal park, if such should be their opinion of the place, as an important ingredient in the consideration of the question whether the deer were reclaimed or not, when he directed them that the question whether the deer had been reclaimed, must be determined by a consideration, among the other matters pointed out, of the nature and dimensions of the park in which they were confined: and we do not perceive any objectionable omission in the judge's direction in this respect, unless the jury ought to have been directed that such fact was conclusive to negative the reclamation of the deer.

It has not been, on the part of the defendant, contended, in terms, that deer kept in a legal park, can, in no case, be deemed to have been tamed or reclaimed, although the argument seemed to bear that aspect: but the many cases to be found in the books, in which the question has been agitated, in whom the property was of deer in a park, seem quite inconsistent with such a position; because, in all such cases, the arguments proceeded upon the distinct fact that the deer were in a park, that is, a legal park; and the question was, whether deer continued to be wild animals, in which no property could be acquired, and which therefore, like other game and wild animals, being upon the land, passed with the estate, or whether, by reason of their being tamed and reclaimed, a property could be acquired in the deer, distinct from the estate, although remaining in the park, and which would pass in like manner as other personal property.

*The general position, therefore, to be found in all the books, that deer in a park will pass to the heir, unless tamed and reclaimed, [*797—in which case they would pass to the executor,—seems to be inconsistent with the position, that deer cannot, in any case, be considered as tamed and reclaimed, whilst they continue in a legal park. Many

authorities are cited upon that subject, the names of which it is not necessary to advert to.

The observations made in support of the rule, on the part of the defendant, were rather addressed to a complaint that the learned judge did not give so much weight to the fact of this being a legal park, as they thought belonged to it, than to any exception to what the judge really said upon the subject. There can be no doubt that the learned counsel on the part of the defendant, did not omit to impress upon the jury his view of the importance of the fact of the deer being found in an ancient and legal park; and nothing is stated to have fallen from the judge, calculated to withdraw the attention of the jury from the observations of the counsel made in that respect, or to diminish the force which justly attaches to any of them.

It remains to be considered whether the arguments in support of the rule have shown that the verdict upon the issue, whether the deer were tamed and reclaimed, was warranted by the evidence. In showing cause, on the part of the plaintiff, against the rule, it was contended that the conclusion of the jury, that Eridge Park continued to possess all the incidents of a legal park, was not warranted by the evidence; because, it was said that the franchise had been forfeited by the addition of other lands to the ancient park, and the destruction of the means of ascertaining the ancient boundaries; and numerous authorities were referred to, relating to the requisites for constituting and existing legal park, and of *798] the causes of the forfeiture of the *franchise. But the opinion which the court has formed upon the other parts of the case, renders it unnecessary to enter into the consideration of that question, or into an examination of the authorities referred to.

That it was proper to leave the question to the jury in the terms in which the issue is expressly joined, cannot be disputed: and the direction, that that question must be determined by referring to the place in which the deer were kept, to the nature and habits of the animals, and to the mode in which they were treated, appears to the court to be a correct direction: and it seems difficult to ascertain by what other means the question should be determined, whether the evidence in this case was such as to warrant a conclusion that the deer were tamed and reclaimed. The court is, therefore, of opinion that the rule cannot be supported, on the ground of misdirection.

It is not contended that there was no evidence fit to be submitted to the jury, and that therefore the plaintiff ought to have been nonsuited: but it is said that the weight of evidence was against the verdict.

In considering whether the evidence warranted the verdict upon the issue, whether the deer were tamed and reclaimed, the observations made by Lord Chief Justice WILLES in the case of *Davies v. Powell*, Willes, 46, are deserving of attention. The difference in regard to the mode and object of keeping deer in modern times, from that which anciently

prevailed, as pointed out by Lord Chief Justice WILLES, cannot be overlooked. It is truly stated, that ornament and profit are the sole objects for which deer are now ordinarily kept, whether in ancient legal parks, or in the modern enclosures so called; the instances being very rare in which deer in such places are kept and used for sport; indeed, their whole *management differing very little, if at all, from that of [*799 sheep, or of any other animals kept for profit. And, in this case, the evidence before adverted to, was, that the deer were regularly fed in the winter; the does with young were watched; the fawns taken as soon as dropped, and marked; selections from the herd made from time to time, fattened in places prepared for them, and afterwards sold or consumed,—with no difference of circumstances than what attached, as before stated, to animals kept for profit and food.

As to some being wild and some tame, as it is said—individual animals, no doubt, differed, as individuals in almost every race of animals are found, under any circumstances, to differ, in the degree of tameness that belongs to them. Of deer kept in stalls, some would be found tame and gentle, and others quite irreclaimable, in the sense of temper and quietness.

Upon a question whether deer are tamed and reclaimed, each case must depend upon the particular facts of it: and, in this case, the court think that the facts were such as were proper to be submitted to the jury; and, as it was a question of fact for the jury, the court cannot perceive any sufficient grounds to warrant it in saying that the jury have come to a wrong conclusion upon the evidence, and do not feel authorized to disturb the verdict: and the rule for a new trial must, therefore, be discharged.

Rule discharged.(a)

(a) As to Rotherfeld and Everugg or Krugg, *vide* Inquisit. post mortem, *temp.* Edw. III., Vol. II. fo. 119, 160, 161, 212, 214, 244, 292, 349. Abbrev. Rotul. Orig. in Scaccario, Vol. I. fo. 225 b, Vol. II. fo. 27 b, 225 b, 229 a, 234 a. Calendarium Rotul. Patent. fo. 122 a, 129 b, fo. B. 119, *et alibi*.

*WARREN and Another v. PEABODY. Dec. 4. [*800

By a charter-party it was agreed that the ship should proceed to Baltimore, and there load a full cargo of *produce*, and proceed therewith to the United Kingdom, and deliver the same, on being paid freight “*at and after the rate of 5s. 6d. per barrel of flour, meal, and naval stores, and 11s. per quarter of 480 lbs. for indian corn or other grain;*” that the cargo was not to consist of less than 3000 barrels of flour, meal, or naval stores; and that not less flour or meal than naval stores was to be shipped.

The vessel arrived here with a cargo consisting of 769 hhds. of tobacco, 6047 bushels of bran, 2000 bushels of oats, 5000 oak-staves, and 3 barrels of flour.

The evidence showed, that a quarter of indian corn or wheat weighing 480 lbs. would occupy a space of 10½ cubic feet, and that a quarter of American oats, which weighed upon an average 272 lbs., would occupy a space of 16 cubic feet. It also appeared that oats were not a usual shipment from America:—

Held, that “*other grain,*” in this charter-party, must be taken to mean such description of grain as would average 480 lbs. to the quarter, and therefore to exclude oats; and that the ship.

owner was entitled to receive freight upon the supposition that 3000 barrels of flour, meal, or naval stores had been shipped, and, for the rest of the space, at the rate of 11s. per quarter of indian corn, or other grain of the average weight of 480 lbs. to the quarter.

THIS was an action of *assumpsit*. The declaration stated, that, on the 24th of February, 1847, by a certain charter-party of affreightment then made between the plaintiffs, owners of the good ship or vessel called The Ayrshire, A. 1, of the measurement of 625 tons, or thereabouts, then lying in the port of London, whereof the plaintiff John Howe Brown was master, of the one part, and the defendant, therein described of London, merchant, freighter of the said ship, of the other part, it was mutually agreed by the said parties, amongst other things, that the said ship, being tight, staunch, and strong, and every way fitted for the voyage, should, immediately on her then present inward cargo being discharged, and she was ballasted, sail and proceed to Hampton-Roads, Chesapeake-Bay, for orders, and from thence proceed to Norfolk or Baltimore, as ordered by the charterer's agent, and there load a full and complete cargo of *produce*, which the said merchant bound *801] *himself to ship, not exceeding what she could reasonably stow and carry over and above her tackle, apparel, provisions, and furniture; and, being so loaded, should therewith proceed to Cork or Falmouth for orders, and from thence to a safe port of discharge in the United Kingdom, or so near thereunto as she might safely get, and deliver the same as was customary, on being paid freight "at and after the rate of 5s. 6d. *per* barrel of flour, meal, and naval stores, and 11s. *per* quarter of 480 lbs. for Indian corn or other grain:" That it was further agreed that the captain should await a return of post at Cork or Falmouth, from London, without its being counted in the lay days; the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever, during the said voyage, always excepted; the freight to be paid on unloading and right delivery of the cargo, in cash, less two months' interest, at 5l. *per cent. per annum*: That, forty-five days, exclusive of Sundays, were to be allowed the said merchant, if the ship should not be sooner despatched, for loading the said ship at her port of loading, and unloading at her port of delivery, and twenty days on demurrage, over and above the said laying days, at 8l. *per day*: That the vessel, upon her return, was to be addressed to H. & C. Toulmin, London, to whom the commission on that charter-party was due, ship lost or not lost, and with whom the original charter-party was deposited: That the penalty for non-performance of the agreement, was 2500l.: That the vessel was to be consigned to the freighter's agents; the cargo to be sent alongside, and taken from alongside the said vessel, at the expense and risk of the said freighter; the vessel to be properly prepared, at the owner's expense, to take her cargo of grain and other produce; and the captain to sign bills of lading, without prejudice to the

charter: *That it was further agreed, that the cargo was not to consist of less than 3000 barrels of flour, meal, or naval stores; [*802 that the barrels of naval stores were not to measure more than of flour, and to pay freight accordingly; and that not less flour or meal than naval stores was to be shipped: Mutual promises: Averment, that the said ship, within a reasonable time after the making of the said charter-party, and immediately after discharging her then inward cargo, to wit, on the day and year first aforesaid, was ballasted, and was tight, staunch, and strong, and every way properly fitted, victualled, and manned, with all things needful and necessary for the voyage in the said charter-party mentioned: That thereupon the said master did afterwards, to wit, on the day and year last aforesaid, set sail in and with the said ship, and proceed to Hampton-Roads, Chesapeake-Bay, for orders, according to the said charter-party, and afterwards, to wit, on the day and year aforesaid, arrived there, and was there, to wit, on the day and year aforesaid, ordered by the charterer's agent to proceed, and did then, to wit, on the day and year aforesaid, proceed, to Baltimore, and there load on board the said ship, a certain quantity, to wit, 600 tons, of produce, to wit, tobacco, oats, bran, and spars, and, being so loaded, proceeded therewith, to wit, on the day and year aforesaid, by order of the said charterer, direct to a safe port of discharge in the United Kingdom, to wit, the port of London, and there, to wit, on the day and year aforesaid arrived, and there, to wit, on the day and year aforesaid, made a right and true delivery of the said several articles so on board of the said ship, to and for the defendant, according to the terms of the said charter-party: That although, by reason of the premises, a large sum of money, to wit, the sum of 3000*l.*, became due and payable to the plaintiffs, as and for the freight of the said vessel, for the voyage aforesaid, according to *the terms of the said charter-party, to be paid as in the said charter-party is mentioned and agreed; yet the [*803 defendant had not paid to the plaintiffs the said sum of money, or any part thereof, but to pay the same, or any part thereof, to the plaintiffs, the defendant had wholly refused, and still did refuse so to do, contrary to his said promise and undertaking: That the plaintiffs were, to wit, on the day and year last aforesaid, ready and willing to receive on board the said ship, and carry, according to the terms of the said charter-party, a full and complete cargo, as mentioned in the said charter-party,—whereof the defendant afterwards, to wit, on the day and year last aforesaid, had notice: Yet, that the defendant did not nor would, although often requested so to do, to wit, on the day and year last aforesaid, ship on board the said vessel a full and complete cargo of produce, not exceeding what she could reasonably stow and carry, over and above her tackle, apparel, provisions, and furniture; but wholly neglected and refused so to do, and, on the contrary thereof, shipped on board the said ship or vessel a much smaller quantity, to wit, 600 tons less than the said ship

could reasonably stow and carry as aforesaid,—and thereby, and by reason thereof, the said ship returned to the United Kingdom with an incomplete cargo, and the plaintiffs lost and were deprived of the gains and profits, amounting to a large sum of money, to wit, 2000*l.*, to which they would otherwise have been entitled under and by virtue of the said charter-party.

Plea, payment into court of 1920*l.*, and no damages *ultra*.

Replication, damages *ultra*.

The cause was tried before WILDE, C. J., and a special jury at the sittings in London after Michaelmas term, 1848.

*804] It appeared that the Ayrshire took on board at *Baltimore a cargo consisting of 769 hogsheads of tobacco, 6047 bushels of bran, 2000 bushels of oats, 5000 oak staves, 3 barrels of flour, and a few other articles.

The plaintiff, upon the authority of *Cockburn v. Alexander*, 4 *Man. Gr. & S.* 791, claimed to be entitled to freight upon the supposition that 3000 barrels of flour, meal, or naval stores, in the proportion provided for by the charter-party, had been put on board, and that the rest of the space had been occupied by indian corn or other grain of the same average weight, viz. 480 lbs. *per* quarter: or, in other words, that he was entitled to receive freight at 5*s.* 6*d.* *per* barrel for 3000 barrels of flour, &c., and at the rate of 11*s.* for every 10½ cubic feet beyond 18,756 feet, the space which it was computed that the 3000 barrels would have occupied,—10½ cubic feet being the space which it was proved that each quarter of grain (exclusive of oats, which it appeared had only within a year or two become the subject of importation to this country from America) would occupy.

On the part of the defendant, it was insisted, that, under the terms of the charter-party, he was at liberty to fill up that portion of the ship which would remain unoccupied after the loading of 3000 barrels of flour, meal, or naval stores, with *oats* (as to which, it was proved that the average weight of American *oats per* quarter was 272 lbs., that the quarter would occupy a space of 16 cubic feet, and that *oats* were more compressible than wheat by 22½ *per cent.*); and, therefore, that the damages should be assessed at 11*s.* *per* 16 cubic feet for all beyond the space occupied by the flour, &c.,—in which event, enough had been paid into court.

A verdict was taken for the plaintiff, damages 748*l.* 10*s.*, subject to the opinion of the court as to the proper construction of the charter-party: (a) it being agreed to refer it to a gentleman named (one of the *805] jury), to *settle the amount when the court had ascertained the principle upon which the freight was to be computed; and also to say what sum should be deducted in respect of the cost which the owner would of necessity incur in preparing the vessel, by lining, &c., to receive

a cargo of grain, and also in respect of oats being more susceptible of compression than wheat or any other grain.

Channell, Serjt., in Hilary term last, accordingly obtained a rule nisi to enter a verdict for the defendant, or to reduce the damages.

S. Martin, *Byles*, Serjt., and *Barstow*, now showed cause. The true construction of this charter-party(a) is that upon which the verdict is founded. The owner was bound to take on board any description of produce that might be offered to him: but he was only bound to deliver it upon payment of freight at and after the rates stipulated for, viz. at 11s. per quarter of 480 lbs., that is, by estimating it at 11s. for each portion of the vessel beyond that occupied by the 3000 barrels of flour or meal, which a quarter of grain weighing 480 lbs. would fill. The parties contemplated, not the specific gravity of the grain, but the space it would occupy in the ship: the owner was to receive the same amount of money, whether one description of grain was put on board, or another. [MAULE, J. Why mention weight at all, if the freight was to be estimated upon the amount of space to be occupied?] In *Capper v. Forster*, 3 N. C. 988, 5 Scott, 129, it was laid down, upon the authority of *Thomas v. Clarke*, 2 Stark. N. P. C. 450, that, where a ship is chartered to bring home a cargo of enumerated articles at rates of freight *specified [*806 for each, which articles are not provided by the charterer, the freight must be paid upon average quantities of all the articles, whether the ship return empty or laden with a cargo of articles different from those enumerated. That was followed by *Cockburn v. Alexander*, 4 Man. Gr. & S. 791. There, a ship was chartered to proceed to Port Phillip, and there load, from the freighter's factors, "a full and complete cargo of wool, tallow, bark, or other legal merchandise,"—the quantity of bark, not to exceed one hundred tons, and the quantity of tallow and hides, not to exceed eighty tons,—and was to proceed therewith to London, and deliver the same, "on being paid freight as follows—for wool, 1½d. per lb. pressed, and 1½d. and one eighth of a penny per lb. unpressed, gross weight; tallow, 3l. per ton; bark, 4l. per ton; and hides, 2l. per ton,—the latter not to exceed twenty tons, without consent of the captain, &c.; one-third of the freight to be paid in cash, on unloading and right delivery of the cargo, and the remainder in cash, or by approved bills, at two months following." And it was held, that the freighter was at liberty to load the ship with an assorted cargo of any "legal merchandise;" but that the owners were entitled to be paid freight upon the supposition that the loading consisted of the stipulated quantities of the enumerated goods, viz. one hundred tons of bark, sixty tons of tallow, and twenty tons of hides, and the residue of wool, pressed or unpressed. The court there decided, in effect, that the stipulated rates were to guide in all events, that the freight of enumerated goods was not to be charged upon a quan-

(a) The instrument in this case called a charter-party, was a memorandum of charter not under seal.

from *meruit*, and that *Capper v. Forster* gave the proper measure for estimating the freight in such cases. [MAULE, J. The ground upon which the court proceeded, in *Cockburn v. Alexander*, was, that *807] "the parties had provided for the measure of freight in all possible events: the owner was to deliver the cargo, "on being paid freight as follows."'] The case is distinctly within *Capper v. Forster*. [MAULE, J. It certainly is difficult to say that *anything* is established, if the doctrine laid down by Lord TENTERDEN,^(a) and adopted by this court in *Capper v. Forster*, and confirmed by the subsequent case of *Cockburn v. Alexander*, may not be said to be established.] The words "at the rate of" override the whole sentence. The parties evidently had not *oats* in their contemplation: it was an unusual shipment from the place in question, and it does not fill the description of grain of the weight of 480 lbs. to the quarter. [MAULE, J. Like a measurement ton.] Yea.

Channell, Serjt., in support of the rule. [MAULE, J. No doubt, under the terms here used, "indian corn or other grain," is to be understood any grain, the produce of America, as to which there was a reasonable expectation of its being made the subject of exportation thence to this country. The main question is, whether oats are to be considered as "grain," within the meaning of this charter-party.] *Prima facie* "grain" includes all cereals: and it was proved here, that, though not a very frequent shipment from Baltimore, oats had occasionally been brought from that port. This case is not governed by *Cockburn v. Alexander*. The cargo there was not in any sense a compliance with the charter-party: and a great portion of it was brought from a place other than that contemplated. It may be that the freight for oats is not expressly stipulated for here. [MAULE, J. It is difficult, after the case of *Cockburn v. Alexander*, to say, that the clause providing for the de- *808] livery of the cargo, "on payment of freight "at and after the rate of, &c.," does not mean that freight is to be paid, at and after the rates specified, for the whole cargo, whatever it may consist of.] At all events, the defendant is entitled to a deduction, in respect of the cost of lining and preparing the ship for a cargo of grain. [MAULE, J. We all think that a proper item of credit: the amount will be settled by the referee.]

MAULE, J. This case turns upon the interpretation of a charter-party, which certainly is not without difficulty. It frequently happens that instruments of this sort are prepared in anticipation of a state of circumstances which never arises; and, consequently, they are sometimes of difficult application to the case which has arisen. The charter-party in the present case provides that the *Ayrshire* shall proceed to Norfolk or Baltimore, and there load a full and complete cargo of produce, and proceed therewith to a port in the united kingdom, and deliver the same,

(a) Abbott on Shipping, 8th edit., p. 411.

on being paid freight "at and after the rate of 5s. 6d. per barrel of flour, meal, and naval stores, and 11s. per quarter of 480 lbs. for indian corn, or other grain." The ship arrived at her destination without a full cargo, the freighter being unable to furnish a full cargo. The owner, no doubt, is entitled to compensation for this breach of contract. The cargo the freighter engaged to furnish was, "a full and complete cargo of produce;" which would be satisfied by a shipment of any article of commerce which was usually shipped from the loading port. That being what the parties contemplate and describe, they proceed to stipulate for the rate of compensation which the owner is to receive, which they say is to be as mentioned above. Now, that enumerates and specifies certain articles of produce, and the respective prices to be paid for them: it applies the rate, in terms, to all produce: the owner *engages to deliver the cargo at the port of destination, "on being paid freight at and after the rate," &c. A [809

somewhat similar clause was contained in the charter-party in *Cockburn v. Alexander*, where the freighter engaged to ship a full cargo consisting of wool, tallow, bark, or "other legal merchandise," on payment of freight as follows,—giving a specific rate of freight only for wool, tallow, bark, and hides: and we there adhered to the previous decision of this court in *Capper v. Forster*, that other legal merchandise, besides the articles enumerated, was not to be carried gratuitously, or upon a *quantum meruit*, but that this was to be taken to be an express provision (difficult, perhaps, of application) for regulating the amount of freight to be paid for merchandise of any kind. That was the construction put by this court upon the clause of the charter-party in *Cockburn v. Alexander*: and I am unable to discover any substantial difference between the two cases; nor do I see any sufficient reason for dissenting from the doctrine there laid down. I therefore think that the clause in question provides a rate of freight which is to be paid for any description of produce shipped under this charter-party. It is manifest that the intention of the parties was, that the cargo should be delivered only on payment of *some* freight: and, unless the construction I have mentioned is put upon the charter-party, no freight at all would be provided for in respect of any but the actually enumerated articles. Taking it, then, to be a clause by which the parties intended to regulate the amount of freight to be paid for all descriptions of goods coming within the general term "produce," it helps us towards the construction of another part of the instrument, which depends upon the nature of the trade at the loading port. We think,—not without some doubts crossing the minds of some members of the court,—that the clause, when speaking of "indian *corn or other [810 grain," must be construed to mean other grain *exclusive of oats*, which are a description of grain but recently the subject of exportation from America to England. But, as this clause was intended to regulate the freight, not for grain only, but for every description of goods,—for which purpose it was necessary that it should ascertain a precise or reasonably precise rate of payment,—we think there is sufficient

reason for excluding oats, as not being within the probable intention of the parties when speaking of "other grain." The relation in which oats, according to the evidence given in the cause, stand to other produce, confirms us in this view. With respect to indian corn, which weighs about 480 lbs. *per* quarter, and wheat, 11s. *per* quarter is to be paid. But oats being a grain to which that is not applicable, and not having long been imported from that place, we think they are like any other produce to be brought, the freight of which is not regulated by that stipulation, but that they are to be paid for after a rate to be deduced from the rate of 5s. 6d. *per* barrel for flour or meal, and 11s. *per* quarter of indian corn or other grain of the average weight of 480 bbls. *per* quarter. The proper mode, therefore, of estimating the damages, will be, to assume that the stipulated number of barrels of flour was put on board, and the residue of the vessel filled up with other goods, at an amount of freight calculated upon the rule which the parties have laid down, viz. 5s. 6d. *per* barrel of flour, and 11s. for every 480 lbs. of indian corn or other grain. That, I believe, is the calculation upon which the verdict is founded; and therefore the rule will be discharged, except as to one item for which it is conceded the defendant is entitled to credit, viz. the expense to which the owner would have been put if he had prepared the vessel for the reception of a full cargo of wheat,—which amount, it is agreed, shall be settled out of court.

*811] CRESSWELL, J. I entirely concur in the opinion expressed by my brother MAULE upon the construction of this charter-party. The owner, on the one hand, contracted to take on board a full and complete cargo of produce, and on the other to receive a certain rate of freight. It appears clearly that the intention of the parties was, that the cargo of "produce" should be delivered on payment of freight at and after the rates mentioned, viz., at and after the rate of 5s. 6d. *per* barrel of flour, &c., and 11s. *per* quarter of 480 lbs. for indian corn or other grain; which, I take it, must mean such other grain as came within the description of weighing 480 lbs. *per* quarter: otherwise, you would be giving three or four rates of freight, which never could have been intended. Oats may be taken to come within the description of "produce," though only very recently become the subject of importation from Baltimore; but they are not included in the description of grain weighing 480 lbs. *per* quarter. I therefore think this rule must be discharged,—subject to the inquiry alluded to by my brother MAULE.

V. WILLIAMS, J. For the reasons already assigned, I concur in thinking that oats do not fall within the description of grain for which freight was to be paid at the rate of 11s. *per* quarter, and that the case is governed by the decision of this court in *Cockburn v. Alexander*.

TALFOURD, J. I am of the same opinion. The result of our decision will be, that the verdict will be reduced by such sum as the referee may

ascertain as the expense of lining and preparing the ship for a cargo of grain.
Rule discharged accordingly.

*FRANÇOIS VANDER DONCKT v. THELLUSSON. [*812
Dec. 7.

The law of a foreign country on a given subject, may be proved by any person who (though not a lawyer or a person, who, by reason of his having filled any public office, may be presumed to be acquainted with the law) is, or has been, in a position to render it probable that he would make himself acquainted with it.

Therefore, an hotel-keeper in London, a native of Belgium, who stated that he formerly carried on the business of a merchant and commissioner of stocks in Brussels, was permitted to prove the law of Belgium on the subject of the presentment of a promissory note made in that country payable at a particular place.

A promissory note described in the body of it as "payable on the last day of October. At A. B.'s,"—must, by the law of England, be presented at the place named; and the latter words are not to be treated as a mere memorandum, because separated from the former by a full point.

DEBT, on two foreign promissory notes.

The first count stated that the defendant, theretofore, to wit, on the 25th of March, 1843, in parts beyond the seas, to wit, at Brussels, in the kingdom of Belgium, according to the law of the said kingdom of Belgium in that behalf, made his promissory note in writing, and delivered the same to the plaintiff, and thereby promised to pay to the plaintiff the sum of 2000 francs at the end of the month of July, 1843, for value received,—which period had elapsed before the commencement of the suit: Averment, that the said sum of 2000 francs in the said promissory note mentioned, at the time of the making of the said note, and when the same became due, was, and is, of great value, to wit, of the value of 80*l.*, of lawful money of Great Britain: whereby, &c.

The second count was upon a similar note, dated the 31st of July, 1843, for 500 francs (or 20*l.*), and payable three months after date.

There was also a count upon an account stated.

The defendant pleaded,—first, that he did not make the said promissory notes in the first and second counts mentioned respectively, or either of them, in *manner and form as in those counts respectively alleged; concluding to the country. [*818

Secondly, to the first and second counts, that the promissory notes in the said first and second counts mentioned respectively, were respectively made beyond the seas, at a certain place in the kingdom of Belgium, to wit, at Brussels, and not elsewhere; that the plaintiff and the defendant respectively were, before and at the time of the making thereof respectively, domiciled in the said kingdom of Belgium, to wit, at Brussels aforesaid, and the said promissory notes respectively were made as and for promissory notes within the true intent and meaning of the laws of the

said kingdom of Belgium; that, by the laws of the said kingdom of Belgium, at the time of the making of the said notes respectively, and thence hitherto in force, every promissory note made within the said kingdom of Belgium must bear date of some certain day in the said note named, and that any writing purporting to be a promissory note, and not having such date as aforesaid, is by the said laws wholly ineffectual to charge the maker thereof; and that the promissory notes in the first and second counts mentioned respectively, did not, nor did either of them, nor did they or either of them at any time, bear date of any certain day in the said notes respectively named: verification.

Thirdly, that the promissory notes in the said first and second counts of the declaration mentioned respectively, were respectively made in a certain place in the said kingdom of Belgium, to wit, at Brussels, and not elsewhere, and the plaintiff and defendant respectively were, before and at the time of the making thereof, respectively domiciled within the said kingdom, to wit, at Brussels aforesaid, and the said promissory notes respectively were made as and for promissory notes within the true intent *814] and meaning of the said laws of the said kingdom of Belgium; that, by the laws of the said kingdom of Belgium, at the time of the making of the said notes respectively, and thence hitherto in force, there must appear on the face of every promissory note made within the said kingdom of Belgium, the name of some person or persons to whose order such promissory note is made payable, and that any writing purporting to be a promissory note, and not bearing upon the face of it the name of some person or persons as last aforesaid, is by the said laws wholly ineffectual to charge the maker thereof; and that there does not, nor did there at any time, appear on the face of the promissory notes in the first and second counts of the declaration mentioned respectively, or on the face of either of them, the name of any person or persons to whose order respectively the said notes respectively were or are payable: verification.

Fourthly, that the promissory notes in the said first and second counts of the declaration mentioned respectively, were respectively made at a certain place in the kingdom of Belgium, to wit, at Brussels, and not elsewhere, and that, before and at the time of the making of the said notes respectively, the plaintiff and defendant were respectively domiciled in the said kingdom of Belgium, to wit, at Brussels aforesaid, and that the said promissory notes were respectively made as and for promissory notes within the true intent and meaning of the laws of the said kingdom of Belgium; that, by the said laws of the said kingdom of Belgium, at the time of the making of the said notes respectively, and thence hitherto in force, there must be named, or appear, in and upon every promissory note made within the said kingdom of Belgium, the name of some certain place at which the same is made payable, and that any writing purporting to be a promissory note, in or upon which there shall not be named, or

appear, the name of *some such place as aforesaid, shall not be available to charge the maker thereof; and that there is not, nor [*815 was there at any time named, nor was there, nor did there appear, in or upon the said promissory notes, or either of them, the name of any such place as last aforesaid: verification.

Fifthly, that the promissory notes in the said first and second counts of the declaration mentioned respectively, were respectively made at a certain place in the kingdom of Belgium, to wit, at Brussels, and not elsewhere, and that, before and at the time of the making of the said notes respectively, the plaintiff and defendant were respectively domiciled in the said kingdom of Belgium, to wit, at Brussels aforesaid, and the said promissory notes were respectively made as and for promissory notes according to the true intent and meaning of the laws of the said kingdom of Belgium; that, by the laws of the said kingdom of Belgium at the time of the making of the said notes respectively and thence hitherto in force, there must be expressed in and upon every promissory note made in the said kingdom of Belgium, the consideration or value which was given for the same, in money or merchandise, in account, or in whatever other manner, and that any writing purporting to be a promissory note in or upon which there shall not be expressed such consideration or value as last aforesaid, shall not be available to charge the maker thereof; and that there is not, nor was there at any time expressed in or upon the said notes, or either of them, any such value or consideration as aforesaid: verification.

The plaintiff replied to the second plea, that, at the time of the making of the said notes respectively, the promissory notes in the said first and second counts mentioned respectively did, and each of them did, bear date of a certain day in the said notes respectively *named, that is to say, &c. To the third, that, at the time of the making [*816 of the said notes respectively, there did appear on the face of the promissory notes in the first and second counts of the declaration mentioned respectively, and on the face of each of them, the name of a person to whose order respectively the same were respectively payable, to wit, the name of the plaintiff. To the fourth, that, at the time of the making of the said notes respectively, there was, and now is, and there appeared, and now appears, in and upon the said promissory notes, and each of them, the name of a certain place at which the said promissory notes were, and each of them was, made payable, to wit, Brussels aforesaid, in the said kingdom of Belgium. And to the fifth, that, at the time of the making of the said notes respectively, there was, and now is, expressed upon the said notes respectively, and each of them, the value which was given for the same respectively, and for each of them, to wit, value received in cash.

The defendant rejoined, traversing the matters alleged in each of these replications. Issue thereon.

The case was tried before PARKER, B., at the spring assizes at Kingston, in 1849. The two notes were produced. The one declared on the first count was made payable "*chez M. Legrelle*," not stating *where*. The other was as follows:—

"Bruxelles, le 31 Juillet, 1848.

"Bon pour frs. 500.

"A trois mois de date, je payerai à l'ordre de Mons. F. Vander Donckt la somme de cinq cent francs, valeur reçue comptant.

"Accepté, bon pour cinq cent francs, payable à la fin d'Octobre, 1848. Chez M. Legrelle.

"C. THELLUSSON."

*On the part of the defendant, it was objected, that there was
*817] a variance between the declaration and the proof,—the declaration describing the notes as payable generally, and the notes themselves, when produced, appearing to be payable at a particular place, viz., the house of M. Legrelle; and that there was no averment or proof of presentment of the notes there.

The plaintiff called a witness named De Keyser, who stated that he was a native of Belgium; that he had formerly carried on the business of a merchant and commissioner in stocks and bills of exchange at Brussels, but was now an hotel-keeper in London; and that he was well acquainted with the Belgian law upon the subject of bills and notes.

On the part of the defendant, it was objected that M. De Keyser was not an admissible witness to prove the foreign law, he neither being a lawyer, nor a person who was bound, by reason of his holding any office, to have a knowledge of the law of Belgium.

The learned judge, however, overruled the objection.

The witness then stated, that, by the law of Belgium, it is not necessary, even though a bill or note is made payable at a particular place, that it should be presented there for payment.

Under the direction of the learned judge,—who told them, that, if they believed the law of Belgium to be as stated by De Keyser, they must find for the plaintiff,—the jury returned a verdict for the plaintiff.

Willes, in Easter term last, moved for a new trial, on the ground of improper reception of evidence, and misdirection. In order to qualify a person to give evidence of the law of a foreign country, it is essential either that he be a professional man, or that he hold some office which makes it his duty to have a *knowledge of such law. In the case
*818] of the *Queen v. Dent*, 1 Carr. & K. 97, it was ruled by WRIGHTMAN, J., on an indictment for bigamy, that it is not essential that a witness who is called to prove the law of Scotland as to marriage, should be at all connected with the legal profession. But, in *The Sussex Peerage case*, 11 Clark & Fin. 85, 134, Lord LYNTHURST, C., in deciding upon the admissibility of the evidence of Dr. Wiseman, as to the law of Rome regarding marriage, says: "He comes within the description of a

person *peritus virtute officii*. I ought to say at once that it is the universal opinion both of the judges and the lords, that the case (*The Queen v. Dent*), as represented to have been decided by Mr. Justice WIGHTMAN, is not law." And his lordship there (11 Clark & Fin. 124) explains the case of *Ganer v. Lady Lanesborough*, Peake's N. P. C. 25, where a Jewess was permitted to give parol evidence of her having been divorced before the Rabbi at Leghorn, according to the custom of the Jews there, —on the ground that that was not giving evidence of foreign law. [MAULE, J., referred to *Lindo v. Belisario*, Hagg. Con. Rep. 216, where that matter was much discussed. V. WILLIAMS, J. I suppose my brother PARKE thought this was a question of mercantile usage, rather than of law.] He did not so put it. The witness was called to give evidence upon a pure question of law, and one which was long the subject of difference between the courts of King's Bench and Common Pleas in this country.(a) In *Baron de Bode's case*, 8 Q. B. 208, 246, evidence being offered to prove the law of inheritance at a particular time in Alsace, one of the witnesses called for that purpose,—a French lawyer, *practising in Alsace,—stated, on cross-examination, that the feudal [*819 law had been put an end to in Alsace, *de facto*, "by the torrent of the French revolution," and that there was a decree of the French National Assembly to that effect, of the 4th of August, 1789; and he said that he had learned this fact in the course of his legal studies: and this was held, by Lord DENMAN and WILLIAMS and COLERIDGE, JJ.,—PATERSON, J., *dissentiente*,—to be admissible evidence, though no other proof was given of the contents of the decree. That case shows the strictness with which the rule has been construed.

As to the second note, if the place of payment, "*chez M. Legrelle*," forms part of the contract, there is a variance; if not, the issue is wrong. [CRESSWELL, J. It is not of necessity to be paid there. Country bank-notes in England are commonly expressed to be payable at some banker's in London, but they are not the less payable at the local bank.]

WILDE, C. J. As to the first point,—the admission of a witness unconnected with the law, to prove the state of the law of Belgium on the subject of bills of exchange,—we think the point one of sufficient importance to justify the court in granting a rule. As to the other point, however, we think the rule ought not to go. The fourth plea alleges that "there must be named, or appear, in and upon every promissory note made within the kingdom of Belgium, the name of some certain place at which the same is made payable, and that any writing purporting to be a promissory note, in or upon which there shall not be named, or appear, the name of some such place as aforesaid, shall not be available to charge the maker thereof; and that there is not, nor was there at any time named, nor does there appear, in or upon the said

(a) See *Fayle v. Bird*, 6 B. & C. 531, 9 D. & R. 639, 2 C. & P. 303; *Gibb v. Mather* (in error), 2 C. & J. 254, 2 Tyrwh. 189, 8 Bingh. 214, 1 M. & Scott, 387.

promissory notes, or either of them, the name of any such place as last *820] *aforesaid;" and that allegation is traversed by the replication. It does not follow, that, because the Belgian law requires a place of payment to appear on the bill or note, that necessarily restricts the presentment and payment to that place. The issue is to be disposed of by an inspection of the instrument: and, when produced, it shows that a place of payment is named.

A rule nisi having been granted accordingly,

Lush now showed cause. The plaintiff was not bound to prove the foreign law: the allegation that the notes were made according to the law of Belgium was immaterial, and altogether unusual. [MAULE, J. According to the law of England, it would be necessary to aver that the notes were made payable at Legrelle's, and to show a presentment there. CRESSWELL, J. The notes are described in the declaration as payable generally: upon their production at the trial, they appeared to be payable at a particular place. That is a variance. MAULE, J. The objection fails, if the foreign law was competently proved; for, the evidence showed, that, by the Belgian law, instruments in this form are, in effect, payable generally. Confine yourself for the present to the consideration of the note in the second count,—whether "Chez M. Legrelle" was part of the contract, or a mere memorandum.] As to that, the court will judge, from an inspection of the note, where the contract closes. Unless it is palpable that the words "Chez M. Legrelle" were intended to form part of the note, the court will incline to exclude them, and treat them as a mere memorandum. The full stop which precedes those words must be taken to mean something. If it be left in doubt, the court will incline to sustain the contract.

Willes, contra. Unless the full stop is to have effect given to it,—for *821] which there is no authority whatever,—"the words "Chez M. Legrelle," which precede the signature, must be taken to form part of the note. The courts never regard punctuation, which is an arbitrary arrangement, not unfrequently destructive of the sense. The maxims *Apices juris non sunt jura*," and "*Nimia subtilitas in jure reprobatur: et talis certitudo certitudinem confundit*," are peculiarly applicable to such a case as this. [MAULE, J. I fear we shall hardly escape from the application of these maxims, whichever way we may decide. I think we must hear the other point.]

Lush. The witness De Keyser was clearly competent. It was not necessary that he should be a lawyer. [MAULE, J. In the *Sussex Peerage* case, it is to be observed, the House of Lords was sitting as a Committee of Privileges only, and not as a court of justice, properly so called. In the *Banbury Peerage* case, 12 Howell's State Trials, 1183, the *Berkeley Peerage* case, and the *Queen's case*, where the Lords were sitting under their original jurisdiction, the common law judges were called upon to consider certain points of law which were submitted to

them. Their opinions are considered authorities to a certain extent, and are often cited.] This was simply a question of commercial usage. The witness had been a merchant and stock-broker at Brussels,—a person who must be conversant with money securities : and he proves the custom of merchants as to bills and notes. There is nothing in the Sussex Peerage case to show that a foreign merchant is not admissible for the purpose of speaking to a matter of commercial usage. The language of Lord LANGDALE, M. R., in that case, very much strengthens this view. “The witness,” he says (11 Clark & Fin. 85), “is in a situation of importance ; he is engaged in the performance of important and responsible public duties ; *and, connected with them, and in order to discharge them properly, he is bound to make himself acquainted [*822 with this subject of the law of marriage. That being so, his evidence is in the nature of that of a judge. It is impossible to say that he is incompetent.” A British consul clearly would be admissible upon a question of commercial law. [MAULE, J. The difficulty is, that you are seeking, by evidence of local usage, to impose upon a written instrument a construction different from the obvious meaning of its terms,—a somewhat dangerous doctrine.] The court cannot judicially know that there is any written law upon the subject in Belgium. [MAULE, J. The court is not at liberty to have recourse to usage to construe a written instrument, the words of which have no technical meaning. If De Keyser is not competent to prove the law of Belgium, you say he was competent to prove usage. There is no doubt about that. But, is proof of usage admissible in contradiction of a written instrument ?] It is the fact of the law-merchant of this country putting upon the words of the contract a construction different from their natural meaning, which raises the difficulty. [MAULE, J. Construing the words without reference to the law-merchant, they would mean, “I will pay at the place indicated, if you choose to come and ask for the money there.”] In no case has it ever been held that a lawyer must necessarily be called to speak to Foreign law.

Willes, in support of his rule. The simple question is, whether this hotel-keeper is a competent witness to prove the Belgian law. In Best's Principles of Evidence, § 344, p. 384, it is said : “The use of witnesses being, to inform the tribunal of *facts*, their *opinions* are not, *in general*, receivable as evidence.” “The rule in *question (§ 345, p. 386) is not without its exceptions. Being based on the presumption that [*823 the tribunal is as capable of forming a judgment on the facts as the witness, wherever the circumstances are such as to rebut this presumption, the rule naturally ceases—‘*cessante ratione legis cessat ipsa lex.*’ Thus, on questions of science, skill, trade, and others of the like kind, persons conversant with the subject-matter, called by foreign jurists *experts*, are permitted to give their opinions in evidence. This rests on the maxim, ‘*cuiuslibet in sua arte perito, est credendum ;*’ and the true rule on the

subject seems correctly stated by the late Mr. Smith (1 Smith's Leading Cases, 286), that 'the opinion of witnesses possessing peculiar skill, is admissible whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance; in other words, when it so far partakes of the nature of a science or art, as to require a course of previous habit or study, in order to attain a knowledge of it.' A large number of instances of the application of this principle are to be found in the books." "It is on this principle also, that the evidence of professional or official persons is receivable in proof of foreign laws, who, from the very nature of the subject, can only speak to their judgment or belief." In *Ganer v. Lady Lanesborough*, the question arose as to the marriage customs among the Jews,—a people who, however much favoured in ancient times, are now without laws or courts apart from the ordinary courts of the country of their domicil. [MAULE, J. It is difficult to say that the evidence there did not involve a matter of law.] The line must be drawn somewhere: and it would be safer to draw it so as to exclude all except professional men, and persons who, by virtue of their office, may be said to be *peritos*. [CRESSWELL, J. Would Baron *Rothschild *824] be supposed to know anything about the law of England as to bills of exchange?] As a matter of fact, probably he is *peritus*. The learned judge here decided on the authority of *The Queen v. Dent*, altogether disregarding the fact of that case having been overruled by the *Sussex Peerage case*.

MAULE, J. We must take it to be the law of England, that, in order to prove the law of a foreign country, there must be some special ground for believing that the person who is offered is more than ordinarily capable of speaking upon the subject. In the case of *The Queen v. Dent*, a witness was called who stated that he was acquainted with the law of Scotland, but it did not appear that he was, or ever had been, connected with the law, or in any situation which made it necessary that he should have made himself acquainted with the Scotch law. The members of the Committee of Privileges in the House of Lords, in the *Sussex Peerage case*, thought that the ruling of my brother WIGHTMAN in that case was erroneous. We bow to that decision. The question, then, is, whether the witness who gave evidence of the Belgian law in this case, falls within the principle of exclusion which is implied in the opinion of the lords and the judges in the *Sussex Peerage case*. Unless he does, he was clearly admissible; for, it is upon that ground only that he is said to be inadmissible. The ground of exclusion relied on, is, as in *The Queen v. Dent*, that there is a total absence of any peculiar means of information in the witness on the subject upon which he is called to speak. It appeared that he is now carrying on the business of an hotel-keeper, but that he had formerly been a merchant and stock-broker at Brussels. Whatever the line of business he now follows, if he was an expert

before, he can hardly be said to be less so now. The question is, *whether he is a person having special and peculiar means of [*825 knowledge of the law of Belgium with regard to bills of exchange and promissory notes,—one whose business it was to attend to, and make himself acquainted with, the subject. I think, that, inasmuch as he had been carrying on a business which made it his interest to take cognisance of the foreign law, he does fall within the description of an *expert*. Applying one's common sense to the matter, why should not persons who may be reasonably supposed to be acquainted with the subject,—though they have not filled any official appointment, such as judge, or advocate, or solicitor,—be deemed competent to speak upon it? Persons who have *practised* as physicians are frequently examined, and no inquiry is ever made as to whether or not they have a regular diploma. All persons, I think, who practise a business or profession which requires them to possess a certain knowledge of the matter in hand, are experts, so far as expertness is required.

For these reasons, I am of opinion that this rule must be discharged.

CRESSWELL, J. I am of the same opinion. It is clear from the learned baron's notes, that he had considered the Sussex-Peerage case, and that it occurred to his mind that nothing that passed there showed that this witness was inadmissible. He thought,—and I entirely agree with him,—that the circumstance of Mr. De Keyser having, as a merchant and stock-broker, been conversant with the Belgian law with regard to bills, essentially distinguished the present case from that observed upon in the House of Lords.

V. WILLIAMS, J. I am of the same opinion. It must be taken, upon the evidence of this witness, that it was part of his business as a merchant and broker in Belgium, to acquire a correct notion of the law of that *country regarding bills of exchange. He was, therefore, [*826 an admissible witness; though, it might turn out that his evidence, like that of many experts and scientific persons, was very little worth.(a)

(a) The French Code de Commerce, which, without the modifications it has undergone in France, has continued to regulate the commercial transactions of Belgium ever since the year 1814, when the political severance of the two countries took place, contains the following provision as to negotiable promissory notes (Liv. I. tit. VIII. sect. II. art. 188).—"Le billet à ordre est daté. Il énonce la somme à payer, le nom de celui à l'ordre de qui il est souscrit, l'époque à laquelle le paiement doit s'effectuer, la valeur qui a été fournie en espèces, en marchandises, en compte, ou de toute autre manière."

The witness De Keyser, who was, in effect, called to place a construction upon a written law, made no distinction between bills and notes. With respect to the former, the Code de Commerce, No. 110, instead of requiring, as in the case of a note, the statement of "l'époque à laquelle le paiement doit s'effectuer," has "l'époque et le lieu où le paiement doit s'effectuer." As the same clause says, "La lettre de change est tirée d'un lieu sur un autre," the words "et le lieu où le paiement doit s'effectuer," might be reasonably regarded as relating merely to the "town" in which the payment was to be made.

As to the mode of proving the written law of a foreign country, see *Bochtlink v. Schneider*, 3 Esp. N. P. C. 58; *Clegg v. Levy*, 3 Camp. 166; *Millar v. Heinrick*, 4 Camp. 155. See also *Fremoult v. De Jire*, 1 P. Wms. 429.

TALFOURD, J. I am of the same opinion. Foreign law is matter of fact: any person who can satisfy the court that he has had the means of knowing it, is an admissible witness to prove it.^(a) One who has been long in the habit of attending as a special jurymen in the city of London, would, no doubt, be well qualified to speak as to the law of England on many subjects connected with commerce. As to the *admissibility* of this person's evidence, I think there can be no doubt, whatever may have been the *weight* it was entitled to. Rule discharged.^(b)

(a) *Vide post*, 967 n.

(b) See *Karl Nelson v. Lord Bridport*, 8 Beavan, 527, 547. And see *Broom's Legal Maxims*, 2d edit., 720—726.

*827]

*STEBBING v. SPICER. Dec. 5.

IN ASSUMPSIT on a promissory note made by the defendant, payable to J. H., and endorsed by J. H. to the plaintiff,—it appeared that there were two persons of the same name, father and son, and there was no evidence to show to which of them the note had been given; but it appeared that the endorsement was in the handwriting of J. H. the son:—Held, that, although *prima facie* the presumption would be that J. H. the father was meant, that presumption was rebutted by the son's endorsement.

ASSUMPSIT on a promissory note made by the defendant, payable to John Holland, and endorsed by John Holland to the plaintiff.

Pleas,—1. that the defendant did not make the note,—2. that *the said John Holland* did not endorse it.

At the trial before CRESSWELL, J., at the sittings in London after Michaelmas term, 1848, it appeared that there were two John Hollands, father and son, who were both in desperate circumstances. It was proved that the handwriting of the endorsement was that of John Holland the son. There was no evidence to show whether the note had been given to the father or to the son.

On the part of the defendant, it was submitted that the *onus probandi* was on the plaintiff, that the presumption, according to the authority of *Sweeting v. Fowler*, which was cited from *Byles on Bills*, p. 57, was, that the note was given to the father, and that there was no evidence to encounter that presumption.

The learned judge ruled that it was incumbent on the plaintiff to show that the bill was given to the son, and not to the father, and that there was no evidence at all of that. The jury accordingly found for the defendant.

Bramwell, in Hilary term, 1849, obtained a rule nisi for a new trial, on the ground of misdirection.

Byles, Serjt., and *Griffiths*, now showed cause. The issue to be tried, was, whether the John Holland who was the payee of the note, had, by his own hand, or by the hand of another person, endorsed it to the plaintiff. There was no evidence whatever to prove the affirma-

*828]

tive. Where there are two persons, father and son, bearing the same name and surname, and one is named, without distinguishing between senior and junior, it will be assumed that the father is meant, and not the son. The authorities upon the subject are distinct. In Gregory's case,^(a) it is said: "If speech be of J. S. generally, it shall be intended of the father, or of the eldest son; for, they are the most worthy." So, in Metcalfe's case, 11 Co. Rep. 39 a: "If the father and son are of one name, viz. J. S., if J. S. is named generally in a writ, count, or other record, it shall be intended of the father; for, he is the more worthy." In *Wilson v. Stubs*, Hob. 330, a *capias utlagatum* issued against one Ralph Stubs, and under it Ralph Stubs the younger was arrested: and the court held that "Stubs the younger might have his action of false imprisonment; for, that the defendant being named Ralph Stubs, without addition, shall never be accounted the younger, but always the elder of the two of that name." And, in *Lepiot v. Browne*, 1 Salk. 7, HOLT, C. J., said: "If father and son are both called A. B., by naming A. B., the father, *primâ facie*, shall be intended; but, if a devise were to A. B., and the devisor did not know the father, it would go to the son." That is, that, if there be evidence to encounter the presumption of law, it may be rebutted.^(b) Again, in *Sweeting v. Fowler*, 1 Stark. N. P. C. 106, it was held, that proof of a promissory note payable to Henry Sweeting generally, was *primâ facie* evidence of a promise to Henry *Sweeting the father, and not to Henry Sweeting the son. There [*829 being no evidence here, to show that John Holland the son was the party meant, the direction of the learned judge was perfectly correct. The objection, indeed, might be put higher. Suppose there was but one John Holland, it was not enough merely to produce a note endorsed "John Holland," without showing some connexion between him and the person named in the declaration: *Jones v. Jones*, 9 M. & W. 75. There, in an action by endorsee against the maker of a promissory note, the defendant pleaded,—1. that he did not make the note,—2. that he made it for the accommodation of the plaintiff. There was an attesting witness to the contract, who, on being called at the trial, stated that he saw the signature (Hugh Jones) to the note written by a party whose occupation and residence he described, but that he had had no communication with him since, and that Hugh Jones was a common name in the neighbourhood where the note was made. It was held that there was no evidence to go to the jury, of the identity of the defendant with the maker of the note; and that the second plea could not be called in aid for that purpose. [CRESWELL, J. I think that case has been overruled.]^(c) TAL-

(a) 6 Co. Rep. 20 a, citing the Year Books, 37 H. 6, 29 b (T. 37 H. 6, fo. 29 b, pl. 10), 21 H. 6, 8 (by mistake, *ut videtur*, for 21 H. 6, 26, *Grey v. Botley*, H. 21 H. 6, fo. 26, pl. 9), 13 H. 4, 4 b (*Combe's case*, M. 13 H. 4, fo. 4 b, pl. 8).

(b) It would be a case of *latent ambiguity*.

(c) See *Greenshields v. Crawford*, 9 M. & W. 314, 1 Dowl. N. S. 489. And see *Barker v. Stead*, 3 Man. Gr. & S. 946.

FOURD, J., referred to *The King v. Peace*, 3 B. & Ald. 579, where, upon an indictment for an assault upon Elizabeth Edwards, it was held to be sufficient to prove that an assault was committed upon a person bearing that name, although it appeared that there were two persons,—mother and daughter,—of the same name.] The judgment of Lord DENMAN in *Sewell v. Evans*, and *Roden v. Ryde*, 4 Q. B. 626, to some extent, confirms *Jones v. Jones*.(a)

*880] *Bramwell* and *Gosnell*, in support of the rule. The ruling of the learned judge in this case proceeded entirely upon the citation of *Sweeting v. Fowler* from *Byles on Bills*, p. 57, where the case is incorrectly stated, without the qualification found in the report in *Starkie*—"but, A. B., the son, although styled in the declaration A. B. the younger, bringing the action, and being in possession of the note, is entitled to recover upon it." In *Jarmain v. Hooper*, 6 M. & G. 827, 7 Scott, N. R. 663, in trespass *quare domum fregit* against the sheriff and A., the sheriff justified under a *fi. fa.* issued against the goods of the plaintiff by A.: to this plea the plaintiff replied, that the *fi. fa.* did not issue against the goods of the plaintiff. It appeared that A. had obtained judgment against Joseph Jarmain, who was the son of the plaintiff, and thereupon issued a *fi. fa.* against Joseph Jarmain, without any further description; under which writ, the goods of Joseph Jarmain the elder were taken: and it was held, that the writ afforded no justification to the sheriff. The writ might have meant either father or son. [MAULE, J. The existence of the writ *de indemnitate nominis* proves that.] In *Curtis v. Rickards*, 1 M. & G. 46, 1 Scott, N. R. 155, it was held that the production by the plaintiff of an I O U signed by the defendant, but not addressed, is *prima facie* evidence that it was given to the plaintiff by the defendant; and that, if the latter wishes to rebut the inference arising from its production by the plaintiff, he should show that it had been in the hands of some other party. [The court here interposed.]

MAULE, J. It appears to the court that this case is governed by *Sweeting v. Fowler*, as reported in *Starkie*. There was evidence to go to the jury, that the John Holland whose handwriting appeared on the back of the *note, was the party to whom it was payable. If he *881] was the payee, it was quite the regular course for him to endorse the note: and it would be quite out of the way and wrong,(b) if he were not. It seems to us that the existence of the handwriting of John Holland the son on the back of the note, as endorser, coupled with the fact that one party to the note dealt with it as the son's, was some evidence to go to the jury that the son, and not the father, was the payee. We therefore think there must be a new trial.

The rest of the Court concurring,

Rule absolute.

(a) See *Hamber v. Roberts*, 7 Man. Gr. & S. 361.

(b) *Vide Williams v. The East India Company*, 3 East, 192; *Doe d. James v. Price*, 1 Mann. & R. 683; 5 Mann. & R. 281 (a); 2 N. & M. 591 (a); 6 N. & M. 70 (a); *Vin. Select. Jur. Quæst. lib. 2, cap. 2*.

DIMES v. WRIGHT and Another. Dec. 5.

An attorney's bill is not in compliance with the 6 & 7 Vict. c. 73, unless it furnish reasonable information, showing in what court and in what cause each item charged for has been transacted.

ASSUMPSIT on a solicitor's bill.

Plea,—no signed bill delivered, pursuant to the provisions of the statute 6 & 7 Vict. c. 73, s. 87.

The cause was tried before WILDE, C. J., at the sittings in London after last Easter term. It appeared that one of the defendants was entitled to certain property in right of his wife; that, one of the trustees having become bankrupt, it became necessary to remove him, and to appoint another in his place; and that an application was made to the court of review for that purpose. The bill commenced as follows:—

“In the Matter of Wright and Another.

“1846, Jan. 7. Instructions for petition to the court of review, that P. be appointed trustee, &c., in the place of the bankrupt.

*“Jan. 26. Attending *petitioner's solicitor*, on his bringing copy petition to me, with a request that I would appear and [*832 consent to an order thereon.”

Then came charges for searching for affidavits, for making office copy, &c., and then the following items:—

“Fee to Mr. H. and clerk.

“Attending him.

“28th. Attending court: petition called on, and directed to stand over till Tuesday, the bankrupt undertaking not to receive or deal with the property in the mean time.”

Lower down was the following:—

“In Chancery. Wood v. Wright.

“Feb. 8. Attending court: petition called on, and directed to stand over generally, to be amended, the bankrupt and Mr. K. undertaking by their counsel not to receive or deal with the trust property without the order of the court.”

It was objected, on the part of the defendant, that this bill was not a sufficient compliance with the 37th section of the 6 & 7 Vict. c. 73, inasmuch as it did not distinctly state the name of the cause and of the court in which the business had been transacted.

A verdict was taken for the plaintiff, for 103*l.*, subject to a motion to enter a nonsuit, or a verdict for the defendant, if the court should be of opinion that the bill was an insufficient one.

Humfrey, in Trinity term last, accordingly obtained a rule nisi. He cited *Ivimey v. Marks*, 16 M. & W. 843.

Cockburn and *Carrington* now showed cause. *Martindale v. Falkner*, 2 Man. Gr. & S. 706, and *Sargent v. Gannon*, 7 Man. Gr. & S. 742, are *distinct authorities to show that a solicitor's bill sufficiently complies with the statute, and with the rule which the decisions of [*883

the courts have engrafted upon it, if a statement of the court and cause appears therein by reasonable inference. Here, by reasonable and *necessary* inference, every person looking at this bill, with the knowledge which clients may be fairly expected to have, must at once see that the business *could* only have been transacted in the court of review. COLTMAN, J., in the case last cited, says: "It appears to be established by the cases, that there are two requisites to make an attorney's bill of costs a compliance with the statute, viz., that it should contain the name of the cause, and also that of the court in which the business charged for has been transacted. At the same time, it appears to me, that, in ascertaining whether or not these two essentials concur, we are bound to apply every reasonable and fair intendment to the language of the bill; for, though I agree that the act ought to be so construed as to give the client the benefit intended, yet we are not to shut our eyes to the attorney's claim to have equal justice meted out to him also." Applying that principle here, this bill clearly gives the clients all the information the statute intended to secure to them.

Mellor, in support of the rule. In *Martindale v. Falkner*, MAULE, J., says: "The statute requires the attorney to deliver to his client a bill of his fees, charges, and disbursements, written in a common legible hand, and in the English tongue, except law terms and names of writs, and in words at length, except times and sums,—a provision evidently calculated and intended to secure due information being given to simple people, to enable them at once to see, by a plain and intelligible statement, with what they are charged; and one that would have been unnecessary, if *884] the bill had *been a document addressed to persons skilled in law and the practice of the courts. The object of this provision appears, from the subsequent part of the clause, to be, to enable the client to apply to the court, or to a judge of the court, in which the business, or the greatest part thereof, has been transacted, to have the bill taxed. The intent of the statute clearly was, to enable the client conveniently to get the bill taxed, and, for that purpose, to inform him where he is to apply to obtain such taxation; and that object would not be conveniently effected, unless the bill showed distinctly where the business had been done." And the Court of Exchequer in *Ivimey v. Marks* sustain that view,—holding that the attorney is bound to specify in his bill, as well every court, as the name of every suit, in which the business charged for was done; and that such bill is an entire bill, and, if the same bill blends charges for work done in a court of equity with charges for work apparently done in some court of common law, without pointing out which, the client cannot judge, or be advised, where he should refer the whole bill for taxation. Looking at this bill, it would be impossible even for a lawyer to discover where some of the business charged for was transacted. This case is quite within the principle laid down by the Court of Queen's Bench in *Lewis v. Primrose*, 6 Q. B. 265, 18 Law Journ.

N. S., Q. B. 269. "Why," says Lord DENMAN, in that case, "is the client to be forced to ask questions? And how can we say that he is told in respect of what business the charge is made, when he is not told where the business is done?" In *Sargent v. Gannon*, one court only was referred to.

MAULE, J. I think this rule may be made absolute without affecting to overrule or to qualify any case *upon the subject. I think an attorney's bill fails to be a compliance with the statute, unless [*885 every item contained in it shows, by such expressions as are calculated to furnish reasonable information, in what court and in what cause the business charged for has been transacted. Whether a bill which does not *expressly* show the court and the cause where the business has been done, would be a compliance with the statute, is, perhaps, a thing which is not yet altogether settled. It is, however, settled, that, if the bill is deficient in that information which is essential to enable the party charged to know the court and the cause, with respect to any of the items, it is insufficient. Now, this bill begins with "Instructions for petition to the court of review;" and then follow some items which may be taken to be in that matter,—winding it up with what may be called the *alia enormia* of an attorney's bill, "letters and messengers, &c." Then comes another petition,—“Jan. 26. Attending petitioner's solicitor, on his bringing copy petition to me, with a request that I would appear and consent to an order thereon.” This “petitioner's solicitor” is evidently somebody else; but the bill does not say who. Then come some other items, as to which I have no idea where the business was done. I suppose it was either in the court of Chancery or the court of review. The bill ought to point out in which. That being so, consistently with all the cases, I think we may hold that this bill was not properly delivered.

CRESSWELL, J. I am of the same opinion. The case is not governed by *Martindale v. Falkner*. I have tried in vain to satisfy myself as to the court and cause in which some of the business was done. The item of the 26th of January relates to another and a different petition from that referred to in the item of the 3d. *The petitioner in the latter, [*836 is a different person. The two petitions, also, I find, were of different lengths; for, one copy is charged 2*l.*, the other 3*l.* 10*s.* No mention is made where the search for affidavits took place, or where the attendance when the petition was called on. All is left in uncertainty.

V. WILLIAMS, J. I am of the same opinion. A portion of the bill seems to be for business done in some court, but it does not show, with reasonable certainty, either court or cause. The bill is clearly no compliance with the statute.

Rule absolute, at the plaintiff's election, to enter a verdict for the defendant on the second issue.

RUSSELL v. BRIANT. Dec. 7.

No one can be considered as an offender against the provisions of the dramatic-copyright act, 3 & 4 W. 4, c. 15 (extended to musical compositions by the 4 & 5 Vict. c. 45, s. 20), so as to be liable to an action at the suit of the author or proprietor, unless he, by himself, or his agent, actually takes part in the representation which is a violation of the copyright.

Therefore, one who merely lets a room to the offender, is not liable, even though he supplies the benches and lights, or sells a ticket of admission,—himself deriving no other profit than that arising from the letting of the room.

THIS was an action upon the statutes 3 & 4 W. 4, c. 15, and 5 & 6 Vict. c. 45, ss. 20, 21, for an unauthorized representation or performance of the plaintiff's musical composition.

The first count of the declaration stated, that, after the passing of the statutes 3 & 4 W. 4, c. 15, and 5 & 6 Vict. c. 45, the plaintiff had, and still hath, the sole liberty of representing and performing, or causing *837] and permitting to be represented and performed, at any *place or places of dramatic entertainment in any part of the United Kingdom of Great Britain, &c., a certain dramatic piece or musical composition, called, to wit, "The Ship on Fire;" yet that the defendant, well knowing the premises, but contriving, &c., to wit, on, &c., did wrongfully and unjustly cause to be represented and performed the said dramatic piece or musical composition, at a certain place of dramatic entertainment within that part of the United Kingdom, &c., to wit, at "The Horns Tavern," Kennington, in the county of Surrey, without the consent in writing of the plaintiff first had and obtained, contrary to the form of the said statutes; whereby the defendant became liable for each such representation and performance, to the payment of an amount not less than 40s., or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever should be the greater damages, to the plaintiff, the author or proprietor of such musical composition as aforesaid; yet that the defendant had not paid the same damages, or any part thereof, contrary to the form of the said statutes, &c.

The second count was for causing to be represented and performed at the same place, a certain other musical composition of the plaintiff, called "The Gambler's Wife."

Plea, not guilty; whereupon issue was joined.

The cause was tried before WILDE, C. J., at the sittings in London, after Michaelmas term, 1847. It appeared that the plaintiff was the author and proprietor of certain musical compositions called "The Ship on Fire," and "The Gambler's Wife;" that the defendant was the landlord of The Horns Tavern, at Kennington, adjoining to which is a large assembly-room; that, early in the year 1846, this room had been hired by one Henry Smith, for several nights,—viz. for the 5th, 6th, and 13th of *838] March,—for the purpose of giving *public vocal and musical entertainments, for which he paid the defendant 5*l.* per night;

that these entertainments consisted of songs with a piano-forte accompaniment, and remarks and gesticulation illustrative of the songs; that the defendant furnished the platform, benches, and lights, and allowed placards, describing the intended performances, to be stuck up in and about the tavern; that bills or programmes of the entertainment were circulated by Smith, and tickets or cards of admission sold by him, and also by a servant of the defendant at the bar of the tavern,—*one ticket being sold by the defendant himself.*

It further appeared, that the plaintiff, having heard of the proposed entertainments, the announcement of which included the two compositions above mentioned, caused the following letter to be addressed to the defendant:—

“Bartlett’s Buildings, Holborn,
February 23d, 1846.

“Sir,—Mr. Henry Russell has instructed me to give you notice that the under-mentioned songs (The Ship on Fire, The Gambler’s Wife, &c., &c.), with the music belonging to the same, are the exclusive property of Mr. Russell, who has the sole right of publicly singing and performing such songs and music. Mr. Henry Smith having circulated bills announcing his intention to sing and perform these songs and music, I give you notice, that not having obtained Mr. Russell’s consent, he is liable to penalties under the statute 3 & 4 W. 4, c. 15; and that, if you cause, or permit, Mr. Smith to sing such songs, or perform such music, at your house, as advertised by him, you will be liable to the same penalties.

“Yours, &c.

“N——. B——. Attorney for Mr. Russell.

“To Mr. Briant.”

*It was also proved, that, at the entertainment given by Smith on the 13th of March,—Smith himself being the only person who [*839 took part in the performance,—the two songs in question were sung by him, in the manner above mentioned; and that about six hundred persons, each of whom paid 6d. for admission, were present.

On the part of the defendant, it was submitted that there was no evidence to go to the jury, to show that the defendant represented, or caused to be represented, the musical compositions in question, so as to bring him within the statutes.

The learned judge, without, however, expressing any opinion upon the point, declined to nonsuit the plaintiff: and he left it to the jury to say whether the defendant *caused* the two songs to be represented or performed on the evening of the 13th of March.

The jury found that he did: and thereupon a verdict was entered for the plaintiff, damages 40s.

Lush, in Trinity term, 1847, obtained a rule nisi for a nonsuit(a) or a new trial. He admitted that he could not contend that the songs in

(a) *Vide post*, p. 849.

question were not musical compositions within the meaning of the statutes: but he insisted that the place where the performance was exhibited, was not a "place of dramatic entertainment" within the statutes,—the meaning of which must be confined to tragedy, comedy, opera, farce, and, since the case of *Lee v. Simpson*, 8 Man. Gr. & S. 871, pantomime, which necessarily involve something represented by action; for which he referred to Johnson's Dictionary, where "Dramatic" is defined to mean "represented by action; not narrative."

**Locke and Wise* showed cause in Michaelmas term, 1848.(a)
 *840] The statute 3 & 4 W. 4, c. 15, an act to amend the laws relating to dramatic literary property, in s. 1, enacts that "the author of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment, composed, and not printed and published by the author thereof or his assignee, or which hereafter shall be composed, and not printed or published by the author thereof or his assignee, or the assignee of such author, shall have, as his own property, the sole liberty of representing, or causing to be represented, at any place or places of dramatic entertainment whatsoever in any part of the United Kingdom of Great Britain, &c., any such production as aforesaid, not printed and published by the author thereof or his assignee, and shall be deemed and taken to be the proprietor thereof; and that the author of any such production, printed and published within ten years before the passing of this act by the author thereof or his assignee, or which shall hereafter be so printed and published, or the assignee of such author, shall, from the time of the passing of this act, or from the time of such publication, respectively, until the end of twenty-eight years from the day of such first publication of the same, and also, if the author or authors, or the survivor of the authors, shall be living at the end of that period, during the residue of his natural life, have as his own property the sole liberty of representing, or causing to be represented, the same at any such place of dramatic entertainment as aforesaid, and shall be deemed and taken to be the proprietor thereof."

And the 2d section enacts, "that, if any person shall, during the continuance of such sole liberty as aforesaid, contrary to *the intent of
 *841] this act, or right of the author or his assignee, represent, or cause to be represented, without the consent in writing of the author or other proprietor first had and obtained, at any place of dramatic entertainment within the limits aforesaid, any such production as aforesaid, or any part thereof, every such offender shall be liable, for each and every such representation, to the payment of an amount not less than 40s., or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater damages, to the author or other proprietor of such production so represented contrary to the true intent and meaning of this act,—to be recovered, together with double costs of suit, by such

(a) The judges present, were, WILDER, C. J., MANLY, J., and V. WILLIAMS, J.

author or other proprietors, in any court having jurisdiction in such cases in that part of the said United Kingdom, &c., in which the offence shall be committed; and, in every such proceeding, where the sole liberty of such author or his assignee as aforesaid shall be subject to such right or authority as aforesaid, it shall be sufficient for the plaintiff to state that he has such sole liberty, without stating the same to be subject to such right or authority, or otherwise mentioning the same." The provisions of that statute are extended to musical compositions, by the 5 & 6 Vict. c. 45, the 20th section of which enacts that the provisions of that act, and of this act, "shall apply to musical compositions, and that the sole liberty of representing or performing, or causing or *permitting* to be represented or performed, any dramatic piece or musical composition, shall endure, and be the property of the author thereof, and his assigns, for the term in this act provided for the duration of copyright in books; (a) and the provisions hereinbefore enacted *in respect of the property of such copyright, and of registering the same, shall [*842 apply to the liberty of representing or performing any dramatic piece or musical composition, as if the same were herein expressly re-enacted and applied thereto; save and except that the first public representation or performance of any dramatic piece or musical composition shall be deemed equivalent, in the construction of this act, to the first publication of any book: Provided always, that, in case of any dramatic piece or musical composition in manuscript, it shall be sufficient for the person having the sole liberty of representing or performing, or causing to be represented or performed, the same, to register only the title thereof, the name and place of abode of the author or composer thereof, the name and place of abode of the proprietor thereof, and the time and place of its first representation or performance." And the 21st section enacts "that the person who shall at any time have the sole liberty of representing such dramatic piece or musical composition, shall have and enjoy the remedies given and provided in the 3 and 4 W. 4, c. 15, during the whole of his interest therein, as fully as if the same were re-enacted in this act." Much less than the defendant was proved to have done in this case, has been held to be keeping "a house, room, &c., for public dancing, music, or other public entertainments of the like kind," within the 25 G. 2, c. 86, s. 2: *Gregory v. Tuffs*, 6 C. & P. 271, 1 C. M. & R. 310; *Gregory v. Tavernor*, 6 C. & P. 280; *Marks v. Benjamin*, 5 M. & W. 565. In the last-mentioned case, it appeared that music, dancing, &c., had occasionally taken place at the defendant's house (a public house); that no money was *taken by him for admissions, but that the rooms were let to persons who sold tickets, and received [*848 money for admission at the door; but there was no direct evidence that

(a) s. 2. For the life of the author and seven years afterwards, or, if the seven years shall expire before the end of forty-two years from the first publication, for forty-two years; or, forty-two years, where the publication takes place after the death of the author.

the defendant knew of this practice : and yet it was held that there was evidence to go to the jury, of a keeping of the house by the defendant for the purposes mentioned in the statute. So, in *The King v. Glossop*, 4 B. & Ald. 616, in a conviction of the defendant for causing to be acted, at a certain place called the Cobourg Theatre, for gain and reward, a certain entertainment of the stage, called Richard the Third, the evidence set forth, was, that the defendant was seen once or twice at the rehearsals of Richard, that another person was the stage-manager, and that the defendant engaged one J. S. to perform, and gave him a check for the amount of his benefit : and it was held that this was sufficient to warrant the justices in drawing the conclusion that the defendant *caused* the play of Richard the Third to be performed. Again, in *Parsons v. Chapman*, 5 C. & P. 33, proof that the defendant was acting manager of a theatre, and that he paid the salary of and dismissed one of the performers, was held sufficient proof that he *caused* the performances. Here, there was abundant evidence that the defendant *caused* or *permitted* the piratical representation complained of. He not only let the room, but he provided all the accessories,—such as lights, benches, &c. ; and he even personally interfered in furthering the performance, by selling a ticket. [WILDE, C. J. In *Planché v. Braham*, 8 C. & P. 68, 4 N. C. 17, 5 Scott, 242, it was held that the word “represent,” in the 3 & 4 W. 4, c. 15, means, the bringing forward on a stage or place of public representation ; and that, if even the words of one song be taken from a piece which is *844] protected by s. 1 of that *act, and be sung on a stage, or any place of theatrical entertainment, that will be a “representing” within the provisions of s. 2 of that statute ; and that the question what is a “representing,” is one that is proper to be left to the jury.] Every man is held to be liable for the consequences that might reasonably be expected to result from his acts : *The King v. Moore*, 3 B. & Ad. 184.(a) The entertainment in question was clearly a “dramatic entertainment,” and the place a “place of dramatic entertainment,” within the words and meaning of the statute : *Lee v. Simpson*, 3 Man. Gr. & S. 871.

Upon the evidence, the jury could not have come to any other conclusion than they did : therefore, the verdict cannot be impeached, even though there was some inaccuracy in the direction of the learned judge : *Gascoyne v. Smith*, M'Clel. & Y. 838 ; *Taylor v. Ashton*, 11 M. & W. 401, 416 ; *Moore v. Tuckwell*, 1 Man. Gr. & S. 607 ; *Hughes v. Hughes*, 15 M. & W. 701.

Lush and *Fitzpatrick*, in support of the rule. The argument on the part of the plaintiff, assumes that the thing complained of was an illegal act. It is only illegal inasmuch as it is an infringement or violation of a private right,—like the infringement of a patent. None of the cases cited have the slightest bearing upon the question. The offender here,—

(a) See the observations upon this case, in *Rish v. Battenfield*, 4 Man. Gr. & S. 783.

using that term in the sense in which it is used in the statute, as explained by the lord chief justice in *Lee v. Simpson*,—was Smith, and Smith only, for whose sole profit the representation took place. If the defendant is liable for the acts of Smith, where is that sort of liability to stop? Is the proprietor of a theatre to be held responsible, if, during *the term, his lessee chooses to perform therein a piece in which some third person has an exclusive copyright? [MAULE, J. Add [*845 to your proposition, that he *knows* when he grants the lease that the lessee intends to represent pieces in which others have copyright.] Be it so; still he would not be responsible. In *Holman v. Johnson*, Cowp. 341, it was held that an action lay for goods sold *abroad*, which are *prohibited here*, if the delivery of them be complete abroad; though the vendor at the time of the sale, knew that they were intended by the vendee to be smuggled into England. The case would be different, if the defendant were party to an express contract for doing the illegal act; as in *Cannan v. Bryce*, 3 B. & Ald. 179, and *The Gas-Light and Coke Company v. Turner*, 6 N. C. 324, 8 Scott, 609.(a) [MAULE, J. Here, the defendant concurs in, and helps, the entertainment. Suppose a man lets a room with a printing-machine and types, knowing that the tenant is about to pirate a work in which a third person has copyright,—would not the former be liable? Would he not be concurring in the piracy?] Clearly not. In the case supposed, there is no *contract* for the doing of an illegal act. [MAULE, J. The defendant disregards the notice sent to him by the plaintiff's attorney.] He had then let the room to Smith; and he could not justify the breaking his contract with him, merely because Smith might possibly contemplate doing something that would render him (Smith) liable to an action. [MAULE, J. Suppose the defendant had contracted with Smith, that he, the defendant, would perform the principal part in a certain dramatic entertainment, and that, after the first night's performance, the defendant had received notice from the author, that the *performance was an infringement of [*846 his copyright,—could the defendant have persisted in performing it, because he was under a contract with Smith?] Certainly not: he would there be an actor. The statute means to charge two classes of persons only,—those who actually take part in the representation,—and those who employ others for that purpose. [MAULE, J. All who concur in causing a thing to be done, are persons who cause it to be done.] According to the natural and only consistent meaning of the statute, the person “causing” the representation, is he who, for himself, or as agent for another, seeks to derive profit from it: this is clear, from the latter part of the section, which gives the author the option of claiming the amount of the profit or advantage arising from the representation. Here, the defendant derives no profit from the representation; nor had he any knowledge, at the time he let the room, that anything would be done

(a) Affirming the judgment of this court, 5 N. C. 666, 7 Scott, 779.

therein, to violate or invade the rights of another. If the statute had intended to embrace persons so situated, it would not have been left to inference; it would have been clearly and unequivocally expressed. Some reliance seems to have been placed upon the word "permitting" in the 5 & 6 Vict. c. 45, s. 20: but that word does not occur in that part of the clause which affects to deal with the offence.

Cur. adv. vult.

WILDE, C. J., now delivered the judgment of the court:

This is an action founded on the statute 5 & 6 Vict. c. 45, ss. 20, 21, by which the provisions of the dramatic copyright act, 3 & 4 W. 4, c. 15, are extended to musical compositions.

The 2d section of the latter act provides, in effect, that, if any person
*847] shall, during the continuance of the *copyright, without the consent in writing of the proprietors thereof, represent, or cause to be represented, any dramatic production, at any place of dramatic entertainment, "every such offender" shall be liable, for every such representation, to the payment of 40s., or to the full amount of the benefit arising therefrom, or the loss sustained by the proprietor of the copyright (whichever shall be the greater damages), to be recovered by such proprietor, with double costs of suit.

In the present case, the plaintiff, as the proprietor of a certain musical composition, sought, under these enactments, to recover damages from the defendant; and the declaration charged him with having represented, and caused to be represented, at a certain place of dramatic entertainment, a musical composition called "The Ship on Fire." The defendant pleaded not guilty; and, the cause having come on for trial before the lord chief justice at Guildhall, the plaintiff recovered a verdict, with leave reserved for the defendant to move to enter a nonsuit.(a)

A rule having been obtained accordingly, the point upon which the argument ultimately turned, on showing cause, was, whether, at the trial, there was any evidence for the jury, to show that the defendant either represented or caused to be represented the musical composition in question. And we are of opinion, after consideration, that there was no such evidence; and that therefore the rule must be made absolute for entering a nonsuit.

It appeared, at the trial, that "The Ship on Fire" had been represented at The Horns Tavern at Kennington, of which the defendant was the landlord; and that a room in that tavern had been hired from the
*848] defendant by one Smith, for the purpose of public *evening musical entertainments; that, after the performances, consisting of "The Ship on Fire," and other musical compositions, had been continued for some nights, notice was given to the defendant, by the plaintiff, that he was the proprietor of the copyright of "The Ship on Fire," and required that its representation should be discontinued; that the defend-

(a) See *vide post*, p. 849.

ant, after this notice, had some communication with Smith, who avowed his resolution of continuing the representation, notwithstanding the notice; and that the representation was accordingly continued by him, without any opposition on the part of the defendant, in the room at The Horns Tavern. It was also proved, that the defendant furnished the platform and the lights for these performances, and allowed bills of them to be put up in the tavern, and tickets of admission to be advertised to be sold at the bar; and that he had himself sold one of such tickets.

But we are of opinion that those facts afforded no evidence that the defendant represented, or caused to be represented, the musical composition in question, within the meaning of the statute: for, we think,—having regard to the object of the act, and the language of the 2d section,—that no one can be considered as an offender against the provisions of it, so as to subject himself to an action of this nature, unless, by himself, or his agent, he actually takes part in a representation which is a violation of copyright. And, if it were to be held, that all those who supply some of the means of representation to him who actually represents, are to be regarded as thereby constituting him their agent, and thus causing the representation, within the meaning of the act, such a doctrine would, we think, embrace a class of persons not at all intended by the legislature.

On these grounds, we are of opinion that the rule must be made absolute.

Rule absolute.

**Locke*, for the plaintiff, on a subsequent day (Dec. 4), observed that the learned judge had not reserved the defendant leave to [*849 move for a nonsuit, and therefore that the result of the decision of the court would be, that there must be a new trial.

Lush, for the defendant, agreed that this was so.

MAULE, J. There was no evidence that could properly be submitted to the jury to affect Briant: there ought, therefore, to have been a nonsuit. If, however, the point was not reserved, we can only grant a new trial.

Rule absolute, for a new trial.

THOMPSON v. THE WESLEYAN NEWSPAPER ASSOCIATION. Dec. 10.

By the deed of settlement of a joint-stock company, completely registered under the 7 & 8 Vict. c. 110, it was, amongst other things, provided that it should not be lawful for the directors to contract any debts, in conducting the affairs of the company, beyond the sum of 100*l.* at any one time, except in the case of the purchase-money for a certain newspaper, of which the board of directors might leave unpaid any part, not exceeding 1000*l.*, and might issue "a promissory note," or accept "a bill of exchange," on behalf of the company, for such balance:—Held, that

the substance of the authority was, that the directors might contract a debt to the amount of 1000*l.*, and secure it by a negotiable instrument; and that the directors, having contracted a debt to that amount, were not precluded from giving security for it, *with its legal accretions*, by several notes or bills, instead of a single note or bill.

THIS was an action of assumpsit on two bills of exchange.

The first count of the declaration stated, that, "whereas The Wesleyan Newspaper Association were and are constituted under and by virtue of a certain deed of settlement, bearing date, to wit, the 1st of *850] March, 1847; and whereas the directors for the time being of the said association were and are authorized by the said deed of settlement to accept the bills of exchange hereinafter mentioned;" and it then proceeded to state, that afterwards, to wit, on the 4th of June, 1847, a certain person, designated in the said bills of exchange as hereinafter next mentioned as Ed. Healey, and whose name is otherwise unknown to the plaintiff, by the said name and description of Ed. Healey, made two bills of exchange in writing, and directed the same to the defendants, and thereby required the defendants to pay to the said Ed. Healey, or his order, 107*l.* 1*s.* 9*d.*, value received, four months after the date thereof, which period had elapsed before the commencement of this suit; that thereupon certain persons designated and described in and upon the said bills of exchange as J. Hiley and J. Ware, and then being two of the directors of The Wesleyan Newspaper Association, for and on behalf thereof, by the said names, designations, and descriptions aforesaid, according to and in pursuance of the said statute, accepted the said bill, by writing their said names across the same, and stating that they accepted the same for and on behalf of the said association,—and which said acceptance then was and is countersigned and subscribed by one Edward Brewtnall, then being the managing director, and an officer of the said association, appointed by the said association to act for them in that behalf; and the said person so designated as aforesaid as Ed. Healey then endorsed the same to the plaintiff; and the said defendants then promised the plaintiff to pay the amount of the said bill according to the tenor and effect thereof, and of the said acceptance and endorsement.

The second count was similar in form, upon a bill for 52*l.* 2*s.* 11*d.*, bearing date the 4th of June, 1847.

Pleas,—first, to the first count, that the directors *for the time *851] being of the said Wesleyan Newspaper Association were not authorized by the said deed of settlement to accept the said bills of exchange in the said first count mentioned;—Secondly, that the said persons so designated and described in and upon the said bill in the said first count mentioned, as J. Hiley and J. Ware, did not accept the said last-mentioned bill for and on behalf of the said Wesleyan Newspaper Association, nor were they, at the time of the said acceptance thereof, directors of the said Wesleyan Newspaper Association;—Thirdly, that the said last-mentioned bill was not expressed to be accepted by the said persons so designated and described as last aforesaid, on behalf of the said Wes-

leyan Newspaper Association ;—Fourthly, that the said acceptance of the said last-mentioned bill was not countersigned by the said Edward Brewtnall, nor was the said Edward Brewtnall an appointed officer in that behalf of the said Wesleyan Newspaper Association.

There were similar pleas to the second count.

The cause was tried before MAULE, J., at the second sitting at Westminster, in Easter term, 1848. It appeared that The Wesleyan Newspaper Association was a joint-stock company, completely registered under the statute 7 & 8 Vict. c. 110 ; that the bills of exchange in question had been accepted on behalf of the company in part-payment of the purchase-money for a newspaper, for which they had agreed to give 2000*l.*,—1000*l.* to be paid in cash, and the remaining 1000*l.* by a promissory note ; that the note had accordingly been given, but that the directors, to accommodate the payee, who was unable to negotiate it, afterwards consented to divide the amount into smaller bills,—the whole amounting, with interest for the time they had to run, to 1022*l.* ; and that the bills declared on were two of those substituted bills.

*The deed of settlement of the association was put in by the plaintiff. The 55th clause provided that "it should not be lawful [*852 for the directors to contract any debts in conducting the affairs of the company, beyond the sum of 100*l.* at any one time, except in the case of the purchase-money for the said newspaper,—of which purchase-money the board of directors might leave unpaid any part, not exceeding 1000*l.*, and might issue a promissory note, or accept a bill of exchange, on behalf of the company, for such balance, and should cause such promissory note or bill of exchange to be made, drawn, endorsed, or accepted, in manner directed by the joint-stock companies registration and regulation act."

It was objected, on the part of the defendants, that, under the above clause, the directors were only authorized to accept *one* bill or note, and that, having exercised that authority, they were not warranted in accepting the substituted bills ; and, further, that the sum to which their authority was limited, had been exceeded.

On the other hand, it was submitted, that the fair meaning of the 55th clause was, that the directors might accept to the amount of 1000*l.* ; that the excess beyond the 1000*l.* was made up of interest ; that, at all events, the objection as to the amount could not apply to the earlier bills (which these were) ; and that a *bond fide* holder for value, having no knowledge, or means of knowledge, of the mode of issuing the bills, was not to be affected by any irregularity.

It was also objected, on the part of the defendants, that the bills were not countersigned by the secretary, pursuant to the 45th section of the 7 & 8 Vict. c. 110.

A verdict was found for the defendants on the first and fifth issues, and for the plaintiff upon all the others : and leave was reserved to the

*853] plaintiff to move to enter *the verdict for him on the first and fifth issues also; and leave was likewise reserved to the defendants to enter a verdict for them on the fourth and eighth issues, which raised the objection last urged by them at the trial.

Rules nisi were obtained accordingly, in Easter Term, 1848, by *Byles*, Serjt., for the plaintiff, and by *Talfourd*, Serjt., for the defendants,—the latter was, however, abandoned upon the argument.

Talfourd, Serjt., and *Gray*, in Easter term last, showed cause against the plaintiff's rule. The only question is, whether the directors of this association had authority, under the 7 & 8 Vict. c. 110, and the deed of settlement registered pursuant thereto, to accept these bills. The 44th section of that act(a) regulates contracts generally that are entered into by and with joint-stock companies. And the 45th applies to bills of exchange: it enacts, "with regard to bills of exchange and promissory notes made, accepted, or endorsed on the behalf or account of any such company, so far as relates to the mode of making, accepting, or endorsing the same, and to the liability of any such company thereon, that, if the directors of the company be authorized by deed of settlement or by-law to issue or accept bills of exchange or promissory notes, then every such bill of exchange or promissory note shall be made or accepted (as the case may be) by and in the names of two of the directors of the company on whose behalf or account the same may be so made or accepted, and shall be by such directors expressed to be made or accepted by them on behalf of such company; and that every such bill of exchange and promissory note so made or accepted as aforesaid, shall be countersigned by

*854] *the secretary or other appointed officer of the company on whose behalf the same is expressed to be made or accepted; and that every bill of exchange so made as aforesaid, or received, by or on behalf of the company, may be endorsed in the name of the company by any officer authorized by deed of settlement or by-law in that behalf; and that every such bill of exchange or promissory note so made, accepted, or endorsed as aforesaid, shall, immediately after the making, accepting, or endorsing of the same, be reported to the proper officer of the company on whose behalf the same shall have been made, accepted, or endorsed, and such last-mentioned officer shall enter the same in proper books, to kept for that purpose; and that, if any such bill of exchange or promissory note be not so reported and entered, then the officer by whose default such bill or note shall not be so reported or entered, shall be liable to repay to the company the amount which the company shall pay or be liable to pay in respect of such bill or note." By the terms of the deed of settlement, the directors were not to contract any debts exceeding in the whole 100*l.*, except for one particular and specified purpose; and, as to that, their authority was, to "issue a promissory note or accept a bill of exchange on behalf of the company" for that amount.

Having once done that, their authority was at an end. Even if this had been an ordinary partnership, such an authority would not be presumed. *Greenslade v. Dower*, 7 B. & C. 635, 1 M. & R. 640, is exactly in point: there, A. & B. agreed to take a farm, and pay C., the former occupier, for certain articles, by bills at three months, and C. afterwards, without the knowledge or consent of A., took from B. bills for the amount, payable at six and twelve months, accepted by himself in his own name and A.'s; and it was held, that *A. could not be sued on these bills. Lord TENTERDEN says: [*855 "The agreement signed by Coleman, was, that the amount of the valuation should be paid, partly in cash, and partly by bills at a certain date; and the only question is, whether Coleman ever authorized Dower to pay by bills at a longer date. Willoughby (the drawer) knew the terms of the original agreement, and, as he, with that information, took bills not drawn according to those terms, he took them at his own peril." So, here, the party taking these bills, had the means of informing himself whether or not they were drawn and accepted in conformity with the authority given to the directors by the deed of settlement.(a) The directors of a company incorporated by act of parliament for making a cemetery, being empowered thereby to make contracts and bargains touching the undertaking, and to do and transact all other matters which shall be requisite to be done and transacted for the direction and management of the affairs of the company, are not thereby authorized to raise money, for the purposes of the undertaking, by accepting or endorsing bills of exchange: *Steele v. Harmer*, 14 M. & W. 831. In *Ridley v. The Plymouth, &c., Grinding and Baking Company*, and *The Kingsbridge Flour-Mill Company v. The Plymouth, &c., Grinding and Baking Company*, 2 Exch. 711, it was held that persons seeking to render joint-stock companies, completely registered under the 7 & 8 Vict. c. 110, liable on contracts made with the directors, must show their authority to bind the company, either by the production of the registered deed of settlement, or by proof that the body of shareholders authorized particular individuals to make contracts binding on the company,—even where the company is shown to have the benefit of *the goods.(b) PARKE, B., there says: "The 7 & 8 Vict. c. 110, s. 7, provides that there shall be no complete registration [*856 of such a joint-stock company, until a copy of their deed of settlement shall have been delivered to the registrar of joint-stock companies. It is, therefore, competent to every person dealing with such a company, to ascertain the objects of the company; for the deed must specify them, and also who the directors are; and any person may find, in that deed, the duties of the directors, and their powers, as between them and the company. Therefore, every person seeking to bind the company by a con-

(a) 7 & 8 Vict. c. 110, s. 13.

(b) See *vide* *Smith v. The Hull Glass Company*, ante, p. 668.

tract with the directors, must give some proof of their authority." Here, the directors having once exercised the authority given to them, by signing the promissory note for 1000*l.*, they could not exercise it again; and clearly not to a greater extent.

The case of *Thompson v. The Universal Salvage Company*, 1 Exch. 694, is almost identical with the present. In an action against a joint-stock company upon a promissory note, the declaration stated, that the company was completely registered; that one Samuel Price and one Christopher Lund, then being two of the directors of the company, made their promissory note, and thereby promised, on behalf of the company, to pay to the plaintiff, or his order, 32*l.* 4*s.* 9*d.*, the balance of the plaintiff's account due from the company; which note was then signed by Samuel Price and Christopher Lund, and was then made by them and in their own names, and on behalf of the company, and then was and is expressed by them to be made on behalf of the company, and was then countersigned by the secretary of the company; and thereupon the company, in consideration of the premises, then promised the plaintiff to pay him *the amount of the note according to the tenor *857] and effect thereof: and the count was held bad on general demurrer,—although the note appeared to be drawn in the form required by the 45th section of the statute; because there was no allegation that the two directors had authority to make the note. The finding, therefore, that the bills were accepted for and on behalf of the association, does not affect the question upon these issues, or entitle the plaintiff to judgment on the whole record. It is said that the plaintiff, being a holder for value, was under no obligation to inquire into the authority of the directors to accept. That clearly is a fallacy; for the plaintiff, upon obtaining judgment against the association, may proceed to execution against any individual shareholder, in the manner pointed out by the 7 & 8 Vict. c. 110, ss. 66, 68; and therefore the court will look at this case as if it were an action originally brought against an individual member of the association. [WILDE, C. J. As amongst themselves, no doubt, the members are bound by the covenants in their deed of settlement; but, is the public bound to see that every regulation has been properly carried into effect?]

Byles, Serjt., and *Willes*, in support of the rule. It is submitted,—first, that the directors in this case duly exercised the authority conferred upon them by the deed,—secondly, that, the plaintiff being a *bond fide* holder for value, it is not competent to the defendants to dispute the extent of the authority of the directors, it being conceded that they had *some* authority. Even if the plaintiff be driven to rely on the 55th clause of the deed of settlement, what the directors did here was fully justified. That is merely an enabling provision; it is not to be construed with the strictness contended for on the other side. The rule of

law is well settled, that private arrangements between partners *do not affect the interests of third persons, unless they have notice of the circumstances attending the transaction. *Greenslade v. Dower* has no application: it was the case of a farming partnership; and the party taking the bills had notice of the terms of the agreement. The Wesleyan Newspaper Association stands in the same position as any other principal, who is bound by the acts of his agent within the scope of such agent's authority, although it may have been irregularly exercised. Taking the whole of the deed of settlement together, it confers upon the board of directors a general power to manage the affairs of the company: and, as long as they continue to act substantially within the scope of the authority reposed in them by the deed, their acts bind the association, as being the acts of its accredited agents. Suppose the holder of this bill knows of the limitation of the authority, but is ignorant of the fact of the limits having been transgressed,—what then is his position? [CRESSWELL, J. He knows that no common-law authority existed.] In *Slark v. The Highgate-Archway Company*, 5 Taunt. 792, GIBBS, C. J., declined to receive evidence tending to show that notes issued by the company, were issued for a purpose different from that for which they had authority to issue them,—thinking that, if the company were justified by their act in issuing notes payable to order, it could not have been intended that an endorsee for value should be bound to see to that of which he must necessarily be ignorant, viz. the reasons which induced the company to issue the notes. [CRESSWELL, J. Is not this like taking an overdue bill? The plaintiff takes it upon the faith of the person from whom he receives it. If it turns out that it is drawn in the way provided for by the act of parliament and the deed of settlement, he *has his remedy against the association; otherwise not.] What is there upon the face of either of these bills to show a person to whose hands it might come, that the limit contained in the 55th clause had been exceeded? [COLTMAN, J. Your argument would charge the company to the extent of 10,000*l.*, provided each bill were less than 100*l.*, in the hands of innocent endorsees.] Exactly so. [WILDE, C. J. On whom would rest the *onus* of showing whether the particular bill sued upon, was within or beyond the prescribed limit?] A *bond fide* holder would have no means of ascertaining that, by going to the registrar's office, or consulting the act of parliament.

The allegation in the first count, which is traversed by the first plea,—that “the directors for the time being of the said association were and are authorized by the said deed of settlement to accept the bills of exchange hereinafter mentioned”—might be expunged from the declaration, and enough would remain to entitle the plaintiff to judgment. This record finds that the parties who accepted, were authorized by the association to accept, and that the person who countersigned, had authority to countersign. What the record states must be assumed to be true.

There is enough, therefore, to justify the court in giving judgment for the plaintiff on both these issues. *Cur. adv. vult.*

CRESSWELL, J., now delivered the judgment of the court.

This was a motion, on the part of the plaintiff (pursuant to leave reserved to him at the trial of the cause), to enter a verdict on the first and fifth issues, which were similar issues, applying to the first and second counts of the declaration, and which raised the question whether the directors of The Wesleyan *Newspaper Association,—a joint-
*860] stock company completely registered under the statute 7 & 8 Vict. c. 110,—had authority to accept the two bills upon which those counts were framed.

It appeared in evidence, that the directors, on behalf of the company, had purchased a newspaper, and, in payment of part of the price, made and delivered a promissory note for 1000*l*. The payee, not being able to negotiate a note of that amount, asked them to give him, in lieu of it, bills of exchange for several smaller sums, amounting together to 1000*l*. and interest, calculated up to the time when they would become due. Two of such bills were accordingly accepted, and were endorsed to the plaintiff for value.

The pleas to the first count were,—first, that the directors were not authorized by the deed of settlement to accept the bill,—secondly, that the directors did not accept it,—thirdly, that the bill was not expressed to be accepted on behalf of the company,—fourthly, that the bill was not countersigned by the proper officer, as prescribed by the statute 7 & 8 Vict. c. 110, s. 45. A similar set of pleas was pleaded to the second count.

At the trial, the plaintiff having had the verdict on all the issues joined on these pleas, except the first and fifth, a cross-rule was obtained, on behalf of the defendants, to enter a verdict for them on the fourth and eighth issues.

When the two rules came on to be argued, the counsel for the defendants in effect abandoned their cross-rule; and the argument was confined to the single question, whether the directors had authority, under the deed of settlement, to accept the bills.

The 55th clause stipulates that “it shall not be lawful for the directors to contract any debts in conducting the affairs of the company, beyond the
*861] sum of 100*l*. at any one time, except in the case of the *purchase-money for the said newspaper,—of which purchase-money the board of directors may leave unpaid any part, not exceeding 1000*l*., and may issue a promissory note, or accept a bill of exchange, on behalf of the company, for such balance, and shall cause such promissory note or bill of exchange to be made, drawn, endorsed, or accepted in manner directed by the said joint-stock companies registration and regulation act.”

It was contended, on behalf of the defendants, that the directors had

no authority to issue notes or accept bills, except the limited one conferred by this clause; and that the acceptance of the bills in question was not warranted by that authority,—first, because the authority had been exhausted by issuing the previous note for 1000*l.*,—and, secondly, because the special authority, in order to be properly exercised, should have been pursued in its exact terms; whereas, the acceptances on which the action was founded were a departure from those terms, both because they constituted several instruments, instead of a single one, and also because they exceeded, in the aggregate, the sum of 1000*l.*, to which the authority was limited.

But we are of opinion that we are not bound to construe the authority so strictly. It cannot, we think, be regarded as a mere authority, to be exercised in the very terms in which it is given; for, it is, in fact, an arrangement between partners as to the mode in which a certain number of them shall conduct the business in which they have a common interest. The substance of the authority is, that they may contract a debt to the amount of 1000*l.*, and secure it by a negotiable instrument. And, giving a reasonable construction to the authority, thus considered, we are of opinion that the directors, having contracted a debt to the amount of 1000*l.*, were not prevented from giving security for it, with its legal accretions, by several notes or bills, instead of a single one.

*There are several other clauses in the deed, to which our attention was called by the counsel for the plaintiff, on the argument, [*862 as showing that the requisite authority is conferred on the directors. But the opinion we have expressed as to the 55th clause, makes it unnecessary to discuss any other.

The rule, therefore, which has been obtained on behalf of the plaintiff, must be made absolute, and that obtained on behalf of the defendants, discharged.

Rules accordingly.

MUNROE and Another v. BORDIER and Another. Nov. 30.

The purchaser or remitter in London, of a foreign bill, getting from the drawer, according to the usage in London, credit until the next foreign post day for the amount, and delivering the bill to the payee, who receives it *bona fide* and for value, the drawer is liable for the amount to the payee, although, in consequence of the purchaser or remitter's failure before the next foreign post day, the drawer never receives value for it.

The declaration stated that A. (the defendant) made a bill of exchange, and directed it to B., a merchant in France, requiring him to pay the amount to the order of C. (the plaintiff); that A. delivered the bill to D., who delivered it to C.; and that B. refused payment, &c. A. pleaded that he made and delivered the bill to D. for the use of C., on the faith and terms of being paid the price and value thereof according to the usage of merchants in that behalf, that is to say, on the next foreign post day; that neither C. nor any other person, then, or at any time before or since, paid him the said price or value of the bill, or any part thereof; that he never had any value or consideration for the making or delivery of the bill; and that C. always held and still held the same without any value or consideration whatever to him (A.) for the same. Replication, that after the making of the bill, and before it became due, D., who appeared to

be, and whom C. believed to be, the lawful holder, delivered the bill to him for a good and valuable consideration, and without notice of the premises in the plea mentioned :—
Held, that the plea was no answer to the action ; and that, even if it were sufficient to call upon C. to show *bona fides*, he did so by his replication.

THIS was an action of assumpsit on two foreign bills of exchange.

*863] The first count of the declaration stated that the *defendants, on the 29th of October, 1847, at London, made their bill of exchange in writing, and then directed the same to certain persons in parts beyond the seas, to wit, certain persons carrying on business at, &c., in the kingdom of France, under the style and firm of Messrs. A. de Warn & Co., and thereby required the last-mentioned persons to pay to the order of the plaintiffs a certain sum of foreign money, to wit, the sum of 22,528 francs, 60 centimes, at five days after the date of the said bill of exchange, which period had elapsed, &c. ; and the defendants then delivered the said bill to certain persons carrying on business in London under the firm of Coates & Co., to wit, one Ezra Jenks Coates and one John Hilliard, who then, to wit, on the day and year aforesaid, delivered the same to the plaintiffs ; yet the said persons to whom the said bill was directed as aforesaid, did not pay the said sum of money in the said bill mentioned, or any part thereof, although the same was duly presented to them for payment thereof when it became due, at, &c., in the kingdom of France, that is to say, at London aforesaid ; and the said bill was afterwards, to wit, on, &c., duly protested for non-payment thereof ; and, by reason of the premises, the plaintiffs were put to expense, to wit, &c., for the charges of causing the said bill to be protested,—of all which premises, the defendants afterwards, to wit, on, &c., had notice, &c.

Third plea,—that the defendants made the bill, and delivered the same to the said persons in that behalf mentioned, for the use of the plaintiffs, on the faith and terms of being paid the price and value thereof, amounting to a large sum of money, to wit, 876*l.* 12*s.*, according to the usage of merchants in that behalf, that is to say, on the foreign post-day which would be next after such delivery ; but that, although that day had elapsed long before the commencement of this suit, neither the plaintiffs nor any other person, then, or at any time before *or since, paid *864] to the defendants the said price or value of the said bill, or any part thereof ; and the defendants never had or received any value or consideration whatever for the making or delivery of the said bill, and the plaintiffs always held, and now hold, the same, without any value or consideration whatever to the defendants for the same,—verification.

Replication,—that, after the said bill was so made and delivered by the defendants to the said persons carrying on business in London under the firm of Coates & Co., and before the said bill became due, and before the commencement of this suit, to wit, on the 29th of October, 1847, they, the said last-mentioned persons, who then appeared to be, and whom the plaintiffs then believed to be, the lawful holders of the said bill, and

entitled thereto, delivered the last-mentioned bill to the plaintiffs, for a good, sufficient, and valuable consideration, to wit, to the amount of the said bill; and the plaintiffs then received the same for such good, sufficient, and valuable consideration, and without notice of the premises in the said third plea mentioned,—verification.

To this replication the defendant demurred specially, assigning for causes,—that either the said replication is an argumentative traversa of the allegations of the said third plea, being in effect an averment that there *was* a sufficient and valuable consideration for the bill, as between the plaintiffs as payees and the defendants as makers, or it sets up, by way of answer to the plea, a consideration between the plaintiffs and third persons, not parties to the bill, nor agents of or connected in interest with the defendants; and that the plaintiffs and the defendants being the immediate parties to the contract, as appears on the face of the bill, and it being admitted by the replication that there was no consideration in fact moving from the plaintiffs to the *defendants, the supposed promise or undertaking of the defendants was *nudum pactum*, and no action would lie on the bill at [865 the suit of the plaintiffs, against the defendants as makers.

The plaintiffs joined in demurrer.

Greenwood (with whom was *Byles*, Serjt.), in support of the demurrer. This case is governed by that of *Puget de Bras v. Forbes*, 1 Esp. N. P., C. 117. There, the plaintiff was a foreigner, residing in Holland; and, having a large sum of money here in the funds, employed the house of *Agassiz, Rougemont, & Co.*, as his agents, to sell it out, and to remit it to him in bills on Holland. *Agassiz, Rougemont, & Co.*, applied to the defendants for the purpose, and, on the 17th of February, 1792, got from them bills on Holland, in favour of the plaintiff. It was proved to be the custom of London, for persons in the habit of remitting foreign bills, to give the bills on one day, but not to receive the money for them until the next post day. In this case, the next post day was Tuesday, the 21st. On Monday, the 20th, the house of *Agassiz, Rougemont, & Co.*, stopped payment; so that the defendants in fact had never received any value for the bills which they had so drawn on Holland in favour of the plaintiff; and they having ordered their correspondent abroad not to pay the bills when due, this action was brought against them as drawers of the bills. The plaintiff's case rested merely upon this,—that the law-merchant knows no *nudum pactum*, and that the defendants should have received the money before they granted the bills; and that, in consequence of their not having then received it, and *Agassiz, Rougemont, & Co.* having failed, the plaintiff had lost the money of his which they had sold out of the funds. *The defendants relied on the custom of [866 merchants in the remitting of bills, and that they had been guilty of no laches; that the custom of giving bills on Holland before the receipt of the money for them, was perfectly well known and established; and

that they, therefore, should be allowed to go into that defence against the plaintiff, who was the payee of the bills. Lord LOUGHBOROUGH was of opinion "that it was competent for the defendants to go into this evidence, as against the payee of the bills, he being subject to all the equity the defendants could have had against his agents, Agassiz, Rougemont, & Co., if the bills had been drawn payable to themselves, who must be supposed to have been acquainted with the usage on bills; though his lordship said that such evidence would be inadmissible, had the action been brought by an endorsee for a valuable consideration." Here, the delivery of the bill to Coates & Co., alleged in the declaration, does not mean a delivery so as to make them the legal owners of the bill. Then, the plea alleges that the bill was delivered to Coates & Co. for the use of the plaintiffs, on the faith and terms of being paid the price and value thereof on the next foreign post day,—which, according to *Jefferies v. Austin*, 1 Stra. 674, amounts to a defence: and this is admitted by the replication. [COLTMAN, J. The plea does not allege that the plaintiffs knew of the terms on which the defendants delivered the bill to Coates & Co. V. WILLIAMS, J. The question is, whether the plaintiffs can show a good title.] A man may be a *bonâ fide* holder, and yet may not be able to sue upon the bill. In *Esdaile v. La Nauze*, 1 Y. & C. 394, it was held, that, where a bill of exchange has been negotiated by means of a forgery of the name of the payee as an endorser, a court of *867] *equity will restrain even a *bonâ fide* holder of the bill from suing the acceptor, and will direct the forged instrument to be delivered up to be cancelled; and that, where the original endorsement of the payee's name on a bill of exchange, is a forgery, a real endorsement by the payee after the bill has arrived at maturity, will not give the holder any title. Here, the contest is, between the immediate parties to the contract,—the drawers and the payees, and the plea shows that there was no consideration; which is not directly traversed by the replication.

Channell, Serjt., contra. If this be a good plea, it is well answered by the replication. A similar replication was held good in *Arbounin v. Anderson*, 1 Q. B. 498, 1 Gale & D. 408. [CRESWELL, J. That case amounts to this,—that you have a right to treat the holder of a mercantile instrument payable to bearer, as the true owner. But, have you any authority to show that a payee may treat an intermediate holder as the true owner?] Coates & Co. were lawful holders of the bill; and the plaintiffs, taking it from them *bonâ fide*, and without laches, also obtained a good title to it. The only ground upon which the consideration is sought to be impeached, is, that it moved towards Coates & Co., and not to the defendants. Coates & Co. were not, nor are they alleged to have been, the agents of the plaintiffs: the defendants themselves, by delivering the bill to them, enabled them to give the plaintiffs title. Neither of the cases cited on the other side is applicable here. In *Puget de Bras v. Forbes*, the bill was given to an agent of the payee. *Jefferies v.*

Austin, was a mere case of failure of consideration. And in *Esdaile v. La Nauze*, the *plaintiff sought to make title through a forged endorsement. [*868

Greenwood was heard in reply.

Cur. adv. vult.

WILDE, C. J., now delivered the judgment of the court.

The first count of the declaration alleged that the defendants, on, &c., in London, made their bill of exchange in writing, and directed the same to certain persons in parts beyond the seas, to wit, to certain persons carrying on business in the kingdom of France under the style of A. de Wain & Co., and thereby required them to pay that their first of exchange, to the order of the plaintiffs, a certain sum of foreign money, to wit, 22,520 francs, 60 centimes, at five days after date, &c.; and that the defendants delivered the said bill to certain persons carrying on business in London under the firm of Coates & Co., to wit, to one Ezra Jenks Coates and one John Hilliard, who then delivered the same to the plaintiffs, &c.,—averring presentment to the drawees, non-payment, protest, &c.

There was a second count, in the same form, on another foreign bill.

The defendants pleaded,—thirdly, that they made the bill in the first count mentioned, and delivered the same to the said persons in that behalf in the first count mentioned, for the use of the plaintiffs, “on the faith and terms of being paid the price and value thereof, amounting to a large sum of money, to wit, 876*l.* 12*s.*, according to the usage and custom of merchants in that behalf, that is to say, on the foreign post day which would be next after such delivery;” but that, although that day had elapsed long before the commencement of this suit, neither the plaintiffs nor any *other person, either then or at any time before [*869 or since, paid to the defendants the said price or value of the said bill, or any part thereof, and the defendants never had or received any value or consideration whatever for the making or delivery of the bill; and that the plaintiffs had always held, and did now hold the same, without any value or consideration whatever to the defendants for the same.

The plaintiff replied, that, after the bill in the first count mentioned was so made and delivered by the defendants to Coates & Co., and before the bill became due, and before the commencement of this suit, the said last-mentioned persons, who then appeared to be, and whom the plaintiffs then believed to be, the lawful holders of the said bill, and entitled thereto, delivered the said bill to the plaintiffs, for a good, sufficient, and valuable consideration, to wit, to the amount of the said bill, and the plaintiffs then received the same for such good, sufficient, and valuable consideration, and without notice of the premises in the third plea mentioned.

Special demurrer, assigning for causes, that, either the replication was an argumentative traverse of the allegations of the third plea, being in

effect an averment that there was a sufficient and valuable consideration for the bill as between the plaintiffs as payees and the defendants as makers, or it set up, by way of answer to the plea, a consideration between the plaintiffs and third persons, not parties to the bill, nor agents of, or connected in interest with, the defendants; and that, the plaintiffs and defendants being immediate parties to the contract, as appears upon the face of the bill, and it being admitted by the replication that there was no consideration in fact moving from the plaintiffs to the defendants, the supposed promise of the defendants was *nudum pactum*.

*870] *The plaintiffs having joined in demurrer, the case was argued before us^(a) at the latter end of last Easter term.

In support of the demurrer, the cases of *Puget de Bras v. Forbes*, 1 Esp. N. P. C. 117, *Jefferies v. Austin*, 1 Stra. 674, and *Esdaile v. La Nauze*, 1 Y. & C. 394, were cited.

On the other hand, it was argued that none of those cases were applicable. And we are of that opinion.

In the first, the bill was given to an agent for the payee, who was therefore responsible for the non-payment of the value to the drawer. The second was a mere case of a note given upon a consideration which failed, and was sued upon by the party to whom it was so given. And, in the third, the plaintiff had to make title by endorsement of the payee. A forged endorsement in his name was held, of course, to give no title. A good endorsement was afterwards made; but that was after the bill had become due, and therefore the holder, by virtue of that endorsement, was liable to all equities attaching upon the bill.

Having disposed of those authorities, the counsel for the plaintiffs argued, that, in the present case, Coates & Co. were not, and were not alleged to be, agents for the plaintiffs; and that the defendants, by placing the bill in the hands of Coates & Co., enabled them to confer upon the plaintiffs, by delivery of the bill, a title to sue upon it, without showing any consideration moving from themselves to the drawers: but that, if the plea should be held to furnish any defence to the action, it was answered by the replication: and *Arbouin v. Anderson*, 1 Q. B. 498, 1 Gale & D. 408, was cited as an authority.

*871] We are of opinion, that, upon this record, the *plaintiffs are entitled to recover. The declaration avers a delivery by the drawers to Coates & Co., and by Coates & Co. to the plaintiffs, the payees. The plea does not allege that Coates & Co. were agents for the plaintiffs, or that the bill was delivered to them in that character. It alleges that the bill was delivered to Coates & Co. for the use of the plaintiffs, to whom, therefore, Coates & Co. might lawfully deliver it. But it goes on to say that it was so delivered upon the faith and terms of being paid the price and value on or before a certain day. It does not aver that the

(a) WILDE, C. J., COLTMAN, J., CRESSWELL, J., and V. WILLIAMS, J.

bill was not to be delivered to the plaintiffs until those terms had been fulfilled, or, that they were ever to be fulfilled by the plaintiffs, or that the plaintiffs had notice that such terms were to be fulfilled by Coates & Co., or that Coates & Co. had not given value for the bill: nor is it alleged that the bill was delivered to the plaintiffs before the expiration of the time within which the defendants say the price of the bill was to be paid. So that, even if it be assumed that the plaintiffs knew that Coates & Co. would have till the next foreign post day to pay the price of the bill, they would have a right to conclude, from the bill's remaining in their hands after that day, that the price had been duly paid. On the other hand, if they received the bill from Coates & Co. before the next foreign post day, they would know that the drawers gave credit to Coates & Co. for the money, by placing the bill in their hands and under their control in the mean time. Nor is it alleged that the plaintiffs took the bill without giving value for it. The negative is confined to value passing from the plaintiffs to the defendants.

Now, the writers upon foreign bills contemplate the existence of four parties,—The giver of value, or purchaser of the bill, or remitter, as he is often called,—the drawer,—the party to whom the bill is to be paid *abroad,—and the drawee. The ordinary course of dealing [†872 with reference to foreign bills, as described by them, begins by the sale of the bill by the drawer to some person other than the payee: it, therefore, does not contemplate that the consideration for the bill should necessarily move from the payee to the drawer, or that no person but the drawer should have a right to confer a title to the bill upon the payee: see Beawes's *Lex Mercatoria*, *Bills of Exchange*, par. 6, p. 416, citing Marius, p. 22. And in par. 14, p. 418, he says: "In case of a remitter's failing before he has paid the value, and the person on whom the bill is drawn gets advice of this occurrence before acceptance, and therefore refuses to accept it, the bill, on its returning protested, shall be paid notwithstanding, with all charges, by the drawer, under proof by the possessor that he negotiated the said bill, and paid a just value for it." According to that rule the plaintiffs would in this case be entitled to recover; for, the plea does not deny that they gave a just value for the bill. Again, in par. 15, Beawes states the law to be, that, where the drawer gives credit to the remitter, without advising his principal thereof, if the remitter does not pay the money, the drawer shall suffer the loss.

Here, it is not shown by the plea, that the bill was handed to the plaintiffs before the next post day,—and, for the reasons above given, it seems to be immaterial whether it was handed over before or after that day,—nor that the drawers ever gave notice to the payees that the price had not been duly paid. They may, therefore, be considered to have given credit to the remitter.

It appears to us, then, that, on this declaration and plea, it must be

taken that Coates & Co. were the purchasers of the bill in question ; and that the drawers placed it in their hands with a controlling power *873] over *it, giving them credit for a certain time for the purchase-money ; and that they delivered it to the payees, who received it *bonâ fide*, and for value ; for, no fraud is alleged, and value as between Coates and Co. and the plaintiffs, is not denied.

Under such circumstances, we are of opinion that the plaintiffs acquired a good title to the bill, and may sue the drawers upon it, although they have never received value for it. Suppose the bill had been given to Coates & Co. for their accommodation, or a promissory note had been given to them, made payable to the plaintiffs, in order that they, Coates & Co., might borrow money upon it, or hand it over to the payees, in discharge of a debt, surely the payees, in either case, might sue upon the instrument, without proving the giving of value to the drawer or maker. The want of such value could not be relied upon as an answer to the action, on the ground of the contract between the immediate parties to the instrument being *nudum pactum*.

For these reasons, we are of opinion that the plea does not give a sufficient answer to the declaration ; and, even supposing the plea to be sufficient to call upon the plaintiffs to show that they took the bill *bonâ fide*, and for value, we think that they have done so by their replication. Our judgment on this demurrer must, therefore, be for the plaintiffs.

Judgment for the plaintiffs.

Greenwood, for the defendants, in the following term (Jan. 24, 1850), moved for leave to add a plea to the first count, to the following effect :— That they, the defendants, made the said bill, and delivered the same to the said persons in that behalf mentioned, on the faith and terms of *874] being paid the price and value *thereof, amounting to a large sum of money, to wit, 876*l.* 12*s.*, according to the custom of merchants in that behalf, that is to say, on the foreign post day which would be next after such delivery : And the defendants further say, that the said persons to whom the said bill was so delivered as aforesaid, afterwards, and before the said next foreign post day, remitted the same to the plaintiffs for the purpose only and with directions to the said plaintiffs, that they should collect and receive the amount thereof from the persons on whom the same was drawn, at the maturity of the said bill, for the account of certain other persons, to wit, certain persons trading under the name and firm of Smith, Sumner, & Co., whose names and descriptions are not otherwise known to the defendants, and to be placed to the credit of those persons in account with the plaintiffs, and not otherwise ; and that the plaintiffs received the same bill for that purpose, and on that account, and not otherwise : And the defendants further say,

that, before the bill became due and payable according to the tenor and effect thereof, to wit, on the 1st day of November, 1847, the foreign post day next after the delivery of the said bill by the plaintiffs to the said persons as aforesaid, elapsed, and the said persons did not, nor did any other person or persons whatever, then, or at any other time, pay to the defendants the price and value of the said bill, or any part thereof; and that, before the bill became due, to wit, on, &c., the plaintiffs had notice that the price and value of the said bill was wholly unpaid to the defendants: And the defendants say that no value or consideration whatever was then, or at any other time, given by the plaintiffs for the said bill, either to the defendants, or to the said persons to whom the same was delivered by the defendants, and by whom it was remitted to the plaintiffs as aforesaid, or to any other person or persons whatever; and that the *plaintiffs became and were, and at the time of the maturity of the said bill, and from thence to and at the commencement of this suit continued to be, the holders of the said bill, under the circumstances, and in the manner, and for the purposes, and on the account, in this plea stated, and not otherwise,—verification. [CRESSWELL, J. The substance of your application is, to be permitted to amend after judgment. Have you any affidavit that the fact has only recently come to your knowledge?] No. [CRESSWELL, J. You do not say that Smith, Sumner, & Co. did not give value for the bill. The new plea would only invite another demurrer.] [*875]

WILDE, C. J. The plea upon which we have already pronounced an opinion, was in substance a plea of no consideration. The counsel for the defendants was, during the argument, invited to amend, but declined. The plea now proposed to be added, is, in substance, a plea of no consideration also. If Coates & Co. were indebted to Smith & Co., and on account of that debt gave the bill to them, why should not Smith & Co., by their agents, the plaintiffs, sue on the bill? This is an attempt to plead another bad plea of no consideration. Besides, to allow this, would be improperly evading a wholesome rule of practice, which precludes amendments after judgment,—unless, perhaps, under *very* special circumstances.(a)

The rest of the court concurring,

Rule refused.

(a) When the pleadings were *ore tenus*, the objections were taken and argued *before* the demurrer was entered: it was only upon refusal of the party to amend *after* argument, that his adversary demurred, and prayed the judgment of the court. See the Year-books, *passim*.

*876] *DOE d. CANNON and Another v. CHARLES RUCASTLE
and WILLIAM IRVING. Dec. 8.

Testator devised as follows:—"I give and devise to my son Stephen, a small field at, &c., to hold to my said son Stephen for and during the term of his natural life: and, from and after his death, then I give and devise the same to the issue of his body lawfully begotten, if more than one, equally amongst them; and, in case he shall not leave any issue of his body, lawfully begotten, at the time of his death, then I give and devise the same to my heir or heirs-at-law."

—Held, that Stephen, the son, took an estate-tail.

EJECTMENT for messuages, land, &c., in the parish of Penrith, in the county of Cumberland.

The cause was tried at the Spring assizes for the county of Cumberland in 1848, when a special verdict was returned, which stated, in substance, as follows:—

At the time of the making of the last will and testament of Stephen Cannon the elder, and from thence until the time of his death, he was seised in his demesne as of fee, of and in a field, dwelling-house, barn, and granary, situate in the parish of Penrith, in the county of Cumberland.

Stephen Cannon the elder made and published his last will and testament in writing, on the 18th of November, 1796, whereby he devised as follows:—

"I give and devise to my son Stephen a small field at Freeridge Head, and all that dwelling-house, barn, and granary on the East side of Fryar Gate, to hold to my said son Stephen Cannon, for and during the term of his natural life; and, from and after his death, then I give and devise the same to the issue of his body lawfully begotten, if more than one, equally amongst them; and in case he shall not leave any issue of his body, lawfully begotten, at the time of his death, then I give and devise the same to my heir or heirs-at-law."

The said Stephen Cannon the elder died on the 18th of April, 1797, so seised of the said field, dwelling-house, barn, and granary as aforesaid, without altering or in any way revoking his said will, leaving the said

*877] *Stephen, the devisee, his only son and heir-at-law, him surviving.

Stephen, the son, entered into the premises so devised to him as aforesaid; and, by an indenture of feoffment, bearing date the 31st of January, 1798, in consideration of 85*l.* then paid to him, with livery of seisin then duly made, enfeoffed William Drewry Rimington of the said field at Freeridge Head, being part of the premises so devised by Stephen Cannon the elder, as aforesaid,—to hold to the said William Drewry Rimington, his heirs and assigns, unto and to the use of the said William Drewry Rimington, his heirs and assigns, for ever; by virtue of which feoffment, the said William Drewry Rimington then entered into and

became seised of the said field, according to the form of the said feoffment. [The title to the field was then traced(a) to Charles Rucastle, one of the defendants.]

After Stephen the son had entered into the dwelling-house, barn, and granary so devised to him, he, by an indenture of feoffment, bearing date 31st of January, 1798, with livery of seisin then duly made, enfeoffed Joseph Fawcett of the said dwelling-house, barn, and granary, to hold to him the said Joseph Fawcett, his heirs and assigns, unto and to the use of him the said Joseph Fawcett, his heirs and assigns, for ever; by virtue of which last-mentioned feoffment, the said Joseph Fawcett then entered into and became seised of the said dwelling-house, barn, and granary, according to the form and effect of the said feoffment. [The title to the dwelling-house, barn, and granary was then traced(a) to the defendant William Irving.]

Stephen, the son and devisee of Stephen Cannon the elder, died on the 29th of April, 1831, leaving two children, the issue of his body, lawfully begotten,—Stephen Cannon, in the declaration mentioned, his *oldest son and heir-at-law,—and Thomas Cannon, in the declaration also mentioned, his second son. [*878

The said Stephen Cannon, in the declaration mentioned, was born in the lifetime of Stephen Cannon the elder, on the 18th of March, 1797. Thomas Cannon was born after the death of Stephen Cannon the elder, on the 8th of July, 1808.

Stephen Cannon and Thomas Cannon, in the declaration respectively mentioned, on the 5th of December, 1846,—being after the death of their said father,—and before the 12th of December, 1846, entered into and upon the said field, dwelling-house, barn, and granary devised by the said will of Stephen Cannon the elder aforesaid, then in the possession of the said defendants Charles Rucastle and William Irving; and the said lessors of the plaintiff then demanded possession thereof from the said Charles Rucastle and William Irving; which they refused to give.

The said tenements, with the appurtenances, are the same as those in the declaration mentioned.

The said Stephen Cannon and Thomas Cannon, in the declaration mentioned, did, on the 12th of December, severally demise to the said John Doe the said tenements, with the appurtenances. But, whether or not, upon the whole matters aforesaid, by the jurors aforesaid found, the said Charles Rucastle and William Irving are guilty of the trespass and ejectment within specified, the jurors aforesaid are altogether ignorant, &c. &c.

Couling, for the lessors of the plaintiff. The first question is, what estate Stephen Cannon, the feoffor, took under the will of 1796. If an estate-tail, the defendants in this case are entitled to judgment; for, in that case, the only remedy of the lessor of the plaintiff would be by *for-*

(a) *Quare*, for what purpose?

medon, which is abolished by the 3 & 4 W. 4, c. 27, s. 36. So, if Stephen *879] Cannon the *son, took an estate for life, with contingent remainders being destroyed by the feoffment, the defendants would also be entitled to judgment. But it is submitted that Stephen, the son, took only for life, with a remainder to his sons, which became *vested* immediately on the birth of a son, and so the feoffment was too late. The will, at the outset, expressly confines the estate to an estate for life: it then goes on—"and, from and after his (Stephen's) death, then I give and devise the same to the issue of his body lawfully begotten, if *more than one, equally amongst them.*" This shows that no estate-tail was meant. It then concludes,— "and, in case he shall not leave any issue of his body lawfully begotten at the time of his death, then I give and devise the same to my heir or heirs-at-law." [CRESSWELL, J. Lord TENTERDEN, in *Doe d. Atkinson v. Featherstone*, 1 B. & Ad. 944, rebuked me for urging a similar argument, after the decision in *Jesson v. Wright*, 2 Bligh, 1.] In this will, "issue" means "children" only, to the exclusion of grandchildren. [MAULE, J. "Issue," in the strictest sense, means all descendants.] In deeds, it always means children: in wills, it may mean either, according to the context. In *Doe d. Cooper v. Collis*, 4 T. R. 294, it was held that "issue" is either a word of purchase or of limitation, as will best effectuate the deviser's intention: and therefore, where A. devised his estates to his two daughters, to be equally divided between them, one moiety to one and her heirs, and the other moiety to the other for life, and, after her decease, to the issue of her body and her heirs for ever, and she had one child living at the time of the devise,—it was held, that *880] the second took only an estate for life, with remainders to *her children as purchasers. [MAULE, J. There, there were words of inheritance superadded to the word "issue." CRESSWELL, J. Is it found that Stephen the son was heir-at-law of the testator?] Yes. In *Doe d. Davy v. Burnsall*, 6 T. R. 80,—where the testator devised "all his estates to A. and the issue of her body, as tenants in common, but, in default of such issue, or, being such, if they should all die under twenty-one, and without leaving issue," then over,—it was held, that all the limitations subsequent to that to A., were contingent, and were consequently destroyed by a recovery suffered by A. There, however, there was no distinct devise for life, as here: *prima facie*, the words would seem at once to give an estate-tail. [MAULE, J. There, the words "die without issue" had the same effect as "heirs" in *Doe d. Cooper v. Collis*.] Lord KENYON, in *Doe d. Davy v. Burnsall*, says: "In determining the present case, I proceed on the words of the will, *giving legal effect to every word contained in it*; and they all lead to this conclusion,—that this was a contingency with a double aspect; if M. Owstwick had any children, the estate was limited to them in fee; if she had no children, or, if she had any, and they died under twenty-one, and without

issue, then it was to go to the lessor of the plaintiff. But all these rested in contingency, and the particular estate of freehold by which they were supported, having been destroyed before they were capable of taking effect, they were also destroyed with it." [MAULE, J. "Issue" has two senses,—one, comprehending *all descendants*: and, if there be anything to show that it does not mean that, then it means immediate issue—children.] In all cases, it is a question of intention, upon the whole of the will. Unless the word "issue" in this case is to be read "heirs," the *rule in Shelley's case, 1 Co. Rep. 93 b,—which is not to be adopted unless necessary,—cannot apply. The meaning of the word "issue" [*881 is clearly and lucidly explained in *Slater v. Dangerfield*, 15 M. & W. 263. There, a testator devised lands to his grandson G. D., to hold the same unto and to the use of the said G. D. for the term of his natural life; and, from his decease, unto and to the use of all and every the *lawful issue* of the said G. D., their heirs and assigns, for ever, equally, as tenants in common, and not as joint tenants, when and as he, she, or they should attain his, her, or their age or ages of twenty-one years: and the testator devised all the residue and remainder of his real and personal estate and effects, whatsoever and wheresoever, not before otherwise disposed of, to his daughter S. D. absolutely, for her own sole and separate use: and it was held, that, in the above devise "issue" was to be construed "children," and therefore that G. D. took an estate for life only, with remainder to his children as purchasers, and not an estate-tail; and, consequently, that, on his death without issue, S. D. took under the residuary devise, notwithstanding a disentailing deed executed by G. D. in his lifetime,—such a deed, executed under the 8 & 4 W. 4, c. 74, having no effect in barring future contingent estates, unless the party executing it was in fact a tenant in tail. PARKER, B., in delivering the judgment of the court, says: "The question is one of those which are of very frequent occurrence, namely, whether the word 'issue' is to be treated as a word of limitation or a word of purchase. The general rule in such cases is clear and well established. The word 'issue' in a will, *prima facie* means the same thing as 'heirs of the body,' and is to be construed as a word of limitation; but this *prima facie* construction will give *way, if there be, on the face of the will, sufficient to [*882 show that the word was intended to have a less extended meaning, and to be applied only to children, or to descendants of a particular class, or at a particular time. Though, however, the rule thus stated, is perfectly simple, yet its application is often very difficult. The real question in each particular case is, what are the circumstances which are to be considered sufficient to indicate that the word has been used in a restricted sense. Indeed, the rule itself is one not more applicable to the word 'issue,' than it is to the words 'heirs of the body,' or indeed to any other words which can be suggested. In all cases the *prima facie* import of words used by a testator, is liable to be controlled or

modified by the context. When it was once established that a devise to a man and his issue means the same thing as a devise to him and the heirs of his body, it might have appeared reasonable to hold that all the rules of construction applicable to the latter words were applicable to the former also, considering the great importance of abiding by general rules in the interpretation of wills, with the view of attaining as much certainty and uniformity of decision as the subject admits of. But the courts have been less reluctant to narrow the *prima facie* meaning of the word 'issue,' than of the words 'heirs of the body,' and have done so in some cases, so nearly resembling the present, and so incapable of being distinguished from it on any satisfactory ground, that we, without deciding what the construction would have been, if the words 'heirs of the body' had been used, feel ourselves bound to take the same course, and to hold that the grandson, George Dangerfield, took an estate for life. The case of *Greenwood v. Rothwell*, 5 M. & G. 628, 6 Scott, *883] N. R. 670, is precisely in point. That was a *devise to J. G. for his life, and, after his decease, to all and every the issue of his body, as tenants in common, and the heirs of such issue. Under this devise, the Court of Common Pleas decided that J. G. took an estate for life only. That case is a distinct authority for holding, that, where there is a devise to one for life, with remainder to his issue as *tenants in common*, with a limitation to the heirs general of the issue, the issue take as purchasers in fee. It would be impossible for us to decide, in the case before us, that the grandson took an estate-tail, without at the same time overruling the case of *Greenwood v. Rothwell*. All the circumstances there indicating that the word *issue* was used as a word of purchase, and not of limitation, occur also in the case before us, with the further circumstance, that, in the present case, the parties to take under the description of issue, are only to take *when and as they attain the age of twenty-one years*,—which brings the case very closely within the principle of *Merest v. James*, 1 B. & B. 484, 4 J. B. Moore, 827, where a gift over, in case of the issue dying under twenty-one, was of itself held sufficient to show that the word 'issue' was used in its limited, and not its general sense." [CRESSWELL, J.—You read "issue" as "children," in both parts of the clause. If the testator had had two children born in his lifetime, the remainder would have become vested in them as they were born.] Precisely so. A devise to A. and his issue, gives A. an estate-tail: so, if the devise is, to A. for life, and, after his decease, to his issue, A. takes an estate-tail, if there be a *devise over*. In this latter case, the court will imply an estate-tail, because otherwise the intention of the testator would be frustrated. [MAULE, J. The rule in *Shelley's case* has been applied where the words "equally *884] to be *divided amongst them" have occurred.] Those cases proceed upon the ground that those words of division are to be rejected. In *Jesson v. Wright*, 2 Bligh, 57, Lord REDESDALE says:

"The rule is, that technical words shall have their legal effect, unless, from subsequent inconsistent words, it is very clear that the testator meant otherwise. In many cases, in all, I believe, except *Doe v. Goff*, 11 East, 668, it has been held that the words 'tenants in common' do not overrule the legal sense of words of settled meaning. In other cases, a similar power of appointment has been held not to overrule the meaning and effect of similar words. It has been argued that heirs of the body cannot take as tenants in common; but it does not follow that the testator did not intend that heirs of the body should take, because they cannot take in the mode prescribed. This only follows, that, having given to heirs of the body, he could not modify that gift in the two different ways which he desired, and the words of modification are to be rejected." [V. WILLIAMS, J.—All that Lord REDESDALE means, is, that the mere circumstance of the testator's attempting to restrain words having a definite legal meaning, will not deprive them of their proper effect.] There are two strong circumstances to prevent the word "issue" here being construed to mean "heirs of the body," viz., that the devise to Stephen, the feoffor, is expressly of an estate for life, and there is a devise over.

The two sons of Stephen, the feoffor, it is submitted, took an estate in fee, the condition of their dying in the lifetime of their father, not having happened. In *Doe d. Roake v. Nowell*, 1 M. & Selw. 327, the testator devised all his freehold estates to J. S. for life, and, on his decease, to *and among his children equally, at the age of twenty-one, and their heirs, as tenants in common; but, if only one child should [*885 live to attain such age, to such child and his or her heirs, at his or her age of twenty-one; and, in case J. S. shall die without issue, or such issue should die before twenty-one, then over: and it was held, that the children of J. S. took a vested remainder. Here, if there had been no devise over, on failure of issue of Stephen, the feoffor, living at the time of his death, the previous words would, by implication, have given the fee to him and his issue: but, as the estate was to go over in the event of Stephen's children not surviving him, having survived him, they take the fee. In *Doe d. Wight v. Cundall*, 9 East, 400, under a devise of land to the two children of the testator's brother W. when they attained the age of twenty-one years, but the executor to account to them for the profits until the age of twenty-one, or day of marriage; but, *if either should die before twenty-one*, the survivor to be heir to the other,—it was held that the fee passed; which would go over to the survivor, in case one died under twenty-one, and would descend or be disposable if he died after attaining twenty-one. Lord ELLENBOROUGH, in giving judgment there, having referred to *Frogmorton d. Bramstone v. Holyday*, 3 Burr. 1618, says: "The whole doctrine and effect of these words were there so fully stated, that it is unnecessary to add any further authority. But

Lord MANSFIELD, in another case,^(a) mentions a case of Tomkins v. Tomkins, in Chancery, H. 17 G. 2, where the devise was 'to his brother, in trust for his eldest son, B., till he should attain twenty-one; and, if he should die before twenty-one, then a devise over:' the court held the *886] age of twenty-one to be no limitation of *B.'s interest, but only a limitation of the trust during his minority, and that B. took the whole by implication. There are other authorities which might be cited, that a giving over on a dying before twenty-one, shows an intention, that, if the party attain twenty-one, he should have a fee absolute." This view is further supported by Doe d. Bills v. Hopkinson, 5 Q. B. 223, and Doe d. Comberbach v. Perryn, 3 T. R. 484, cited in Fearne's Contingent Remainders.^(b)

Hugh Hill (with whom was *Lewis*), contra, was not called upon.

MAULE, J. The devise to Stephen Cannon, the feoffor, by the will of 1796, clearly was of an estate-tail. It is well settled, that the word "issue" in a will, means "heirs of the body," unless there are words therein which are inconsistent with or control that construction. The rule in Shelley's case must therefore prevail. The devise, then, being to Stephen and the heirs of his body, gave him an estate-tail: and that estate-tail having been discontinued by the feoffment, it is conceded that the lessors of the plaintiff in this case are not entitled to recover.

CRESSWELL, J., and V. WILLIAMS, J., concurring,

Judgment for the defendants.

^(a) Goodtitle d. Hayward v. Whitty, 1 Burr. 234.

^(b) 10th edit. Vol. I. p. 313.

*887] *BELL and Others, Assignees of GEORGE GEERING, a Bankrupt, v. CAREY, Public Officer of THE LONDON AND COUNTY BANKING COMPANY. Dec. 10.

A plea of mutual credit by way of set-off, cannot be pleaded to a declaration by assignees, charging the defendants with having received a sum of money from the bankrupt for the purpose of meeting a certain acceptance, and neglecting so to apply it, whereby the bankrupt's estate sustained damage,—the claim being for unliquidated damages.

THIS was an action of assumpsit. The declaration stated, that, before the bankruptcy of George Geering, to wit, on, &c., the said George Geering was a customer of, and kept an account with, the co-partnership called The London and County Banking Company, in the way of their business as bankers, of which the defendant was one of the public officers; that, before the bankruptcy, the said George Geering had accepted a certain bill of exchange, drawn, &c., for 175*l.* 2*s.* 8*d.*, at two months, payable at the banking-house of the said co-partnership in London,—of all which premises, the said co-partnership, at the time of

making the promise thereafter mentioned, had notice; that, before the bankruptcy, and before the bill became due, to wit, on, &c., the said George Geering paid the said sum of 175*l.* 2*s.* 8*d.* to the said co-partnership, who then received the same for the purpose and to the intent that the said co-partnership should pay and retire the said bill when presented for payment, and the said co-partnership then promised to pay and retire the said bill when due and presented as aforesaid; that the said bill became due and was presented, before the bankruptcy of George Geering, for payment, to the said co-partnership; that they refused to pay and retire the said bill, whereby the said bill became dishonoured; and that, by reason of the non-performance of their promise by the said co-partnership, and their not returning the said *money, the said George Geering had, before his bankruptcy, been put to great [*888 loss and expense in his trade and business, in respect to the said bill,—to the damage of the plaintiffs, as assignees, &c.

Plea, mutual credit by way of set-off.

Demurrer and joinder.

Willes, in support of the demurrer.(a) The question is, whether the deposit of a sum of money with a banker for the purpose of meeting an acceptance of the customer, becomes a debt within the statutes of set-off, or the 50th section of the bankrupt act 6 G. 4, c. 16. It is submitted, that if a man accepts a bill payable at a banker's, and, whilst the bill is outstanding, goes to the banker and gives him a sum to be specifically applied to the payment of that particular acceptance, and the banker receives the money under an agreement so to apply it, he cannot afterwards claim to retain the money, and set off against it money due to him from the depositor. To be a debt within the statutes of set-off, it must be a sum payable by the terms of the contract to the customer. The case is substantially decided by *Hill v. Smith*, 12 M. & W. 618. There, A. paid to a banking company a sum of money for the specific purpose of providing for a bill of exchange for that amount, drawn by A. upon the company's London bankers. A. was at that time indebted in a larger amount to the company, who, instead of applying the money according to his instructions, placed it to the credit of his account with them. The bill was refused acceptance, and, while it remained unpaid in the hands of the holder, A. [*889 *became bankrupt:—It was held that his assignees were entitled to recover from the company, in a special action of assumpsit, the whole amount of the bill. The observations of PARKE, B., in that case, furnish all that is necessary for the purpose of the present argument. "The debts due to the bankrupt," says the learned baron, "and the damages to be recovered by him for the breach of contracts relative

(a) The point marked for argument, on the part of the plaintiff, was,—“that damages for non-payment of a bill of exchange according to contract, to which bill the defendants are not parties, is not a debt within the statutes of set-off.

to the bankrupt's personal estate, and which affect its value, pass as personal estate to the assignees. We need not inquire further as to the description of contracts, the damages for the breach of which belong to the assignees, for this question is still *sub judice* ;(a) but, for this sort of contract, the assignees are undoubtedly entitled to recover, and stand in the place of the bankrupt himself as to his right to recover,—as they do with respect to his debts, for the recovery of which they had, by 1 Jac. 1, c. 15, s. 18, and have, by 6 G. 4, c. 16, s. 25, the like remedy that the bankrupt himself had. His rights to personal estate are their rights, and the damages due to him in respect of his personal estate, are due to them. What, then, is the amount of damages which the bankrupt would himself have recovered? A jury might, most properly, give the full amount of money placed in the defendant's hands, and misapplied; and the jury in this case *did* give that amount contingently, provided they were warranted by law in giving the damages sustained by the bankrupts: and we think they *were* warranted. When the defendants refused to perform their contract, they ought to have returned the money to the bankrupts; and if they did not, the bankrupts might have treated it as money had and received to their use, and recovered the amount *890] in *indebitatus assumpsit*, if the defendants had not been their creditors; and the circumstance of their being so to an equal amount, is only material, as it would have given them a defence, in that form of action under the statutes of set-off, which were enacted for preventing the necessity of cross-actions. But it would have given a defence, in consequence of the form of action only—not on the merits; and the form of action being changed into one of special assumpsit, there would be no defence at all. This is laid down in *Thorpe v. Thorpe*, 8 B. & Ad. 580, and in *Colson v. Welch*, 1 Esp. N. P. C. 879, which was confirmed by the court on a motion for a new trial. The bankrupts would clearly have recovered the full amount against a wrong-doer not a creditor. Why should a wrong-doer be in a better position, when the law gives him no right of set-off under the statutes of set-off, or the mutual-credit clause in the bankrupt act?" [CRESSWELL, J. This looks like an action for unliquidated damages.] It may be said, on the other side, that the declaration does not sufficiently allege special damage. If special damage, however, be necessary, it is submitted that it is sufficiently averred.

Bramwell, contrà.(b) If the meaning of this declaration is, that the bankrupt paid the 175*l.* 2*s.* 8*d.* into the bank, upon an understanding

(a) Since decided—*Beckham v. Drake*, 2 House of Lords Cases, 579.

(b) The points marked for argument on the part of the defendants, were,—“That the declaration is, in effect, for money had and received to the use of the bankrupt, and so the debt due from the bankrupt to the company can be made the subject of set-off, under the statutes of set-off and bankruptcy: and that the declaration alleges no special damage, but only the receipt of the money, which is a debt due from the company to the bankrupt, and against which the company can set off their claim.”

that the specific moneys should be transmitted to their agents in London *to meet the bill in question, there might be some difficulty in saying that the plea was a good one: but, if the meaning is, that [*891 the money was paid in to his account with the bank, that gave him a claim against the bank as for so much money lent; and though the bankrupt might have a right of action against the company for not appropriating the amount according to the terms of their contract, it would not be a claim entirely for unliquidated damages, and therefore it may be met by a set-off. [MAULE, J. The money was deposited with the defendants for the specific purpose of applying it to the payment of the bankrupt's acceptance; and they failed to do so. Does not that give rise to a claim for unliquidated damages?] The declaration does not state that the money was paid to, and accepted by, the defendants, as a consideration for their undertaking to pay the bill. The question turns upon the 50th section of the 6 G. 4, c. 116, which enacts, "that, where there has been mutual credit given by the bankrupt and any other person, or where there are mutual debts between the bankrupt and any other person, the commissioners shall state the account between them, and one debt or demand may be set against another, notwithstanding any prior act of bankruptcy committed by such bankrupt before the credit given to or the debt contracted by him, and what shall appear due on either side on the balance of such account, and no more, shall be claimed or paid on either side respectively; and every debt or demand hereby made provable against the estate of the bankrupt, may also be set off in manner aforesaid against such estate: provided that the person claiming the benefit of such set-off, had not, when such credit was given, notice of an act of bankruptcy by such bankrupt committed." Claims for money compensation may be liquidated, or unliquidated, and yet *susceptible of ascertainment; [*892 or they may be really unliquidated, and not matter of calculation at all. The intention of the 50th section clearly was, that the two former classes should be the subject of set-off. Supposing the position of these parties was reversed, would this demand have been provable? The certificate of the defendants could not have been defeated by changing the form of action. [MAULE, J. The certificate may always be defeated, where the plaintiff has his election between trover and money had and received. CRESSWELL, J. If the company had neglected to pay the bill, but had returned the money, could the bankrupts have sued them for not paying the bill.] It is submitted that they could. [CRESSWELL, J. Would the demand in that action be provable against their estate, in the case above supposed?] Probably not. [CRESSWELL, J. Then that shows that the *whole* complaint in this action would not have been provable.] If this is in substance an action to recover back the money, it is in truth an action for moneys numbered. In *Groom v. West*, 8 Ad. & E. 758, 1 P. & D. 19, a declaration by assignees of R., a bankrupt, stated that the defendant, in consideration that R. would sell and

deliver to him sugars at the rate and price of, &c., agreed to pay him for the same, prompt two months, or an acceptance at seventy days, if required; that the goods were delivered to and received by the defendant before the bankruptcy, on the terms aforesaid, but that he did not, though required before the bankruptcy, pay, then or since, by an acceptance, nor did he otherwise pay; whereby R., before his bankruptcy, lost the use and benefit of such acceptance, and the benefit which would have accrued to him from having it discounted, and raising money on it for his *893] own use in the way of his trade, and was put to *loss and inconvenience by not having such acceptance to negotiate, and his estate applicable to the payment of his just debts, was, by reason of the non-payment for the goods in manner aforesaid, diminished in value, to the damage of the assignees and creditors: to this there was a plea of set-off for a debt due from R. before the bankruptcy; to which the plaintiff demurred: and it was held, that the concluding averments of the declaration did not show a special damage to the plaintiffs, but only a common pecuniary loss; that the case appearing on the declaration was one of mutual credit within the statute 6 G. 4, c. 16, s. 50; and that a set-off might be pleaded.

MAULE, J. If the company have for a valuable consideration undertaken to perform a certain duty, and have neglected to perform it, they are clearly liable in damages, nominal or otherwise,—if any injury has resulted to the bankrupts from their breach of duty. In some respects the case resembles *Marzetti v. Williams*, 1 B. & Ad. 415. In *Drake v. Beckham*, 11 M. & W. 815, where A. agreed in writing with B. & C., on behalf of themselves and D., as partners in trade, to serve them, B. and C., and the survivor of them, for seven years, as their foreman, and not to engage in trade on his own account, during that period, without their consent; and B. & C. agreed to pay him wages after the rate of 8l. 3s. per week, so long as he should serve them faithfully,—it was held by the Exchequer Chamber, reversing the judgment of the court below, (a) that the right of action for a breach of this agreement, by dismissal of A. from the service, without reasonable cause, passed to the assignees of A. on his bankruptcy, as being part of his personal estate, whereof a profit *894] might be made. *And it was ultimately held by the House of Lords, (a) that the right of action did so pass,—on the ground that the contract contained a clause imposing a penalty for the breach thereof. Here, or in *Marzetti v. Williams*, you could not say that the damages, great or small, would be a demand provable under a *fat*. *Hill v. Smith* is certainly very much in point. The case really sounds in damages. The plea is bad, and the plaintiffs are consequently entitled to judgment.

CRESSWELL, J., and V. WILLIAMS, J., concurred.

Judgment for the plaintiffs.

(a) *Beckham v. Drake*, 9 M. & W. 79.

DOE d. ROGERS v. C. PRICE and W. PRICE. Nov. 30.

A lease was granted of a farm and tenement, and the quarries of paving and tile-stone in and upon the premises, with liberty and power to open and work the quarries, subject to an annual rent for the premises, excepting the quarries, and to the payment of a royalty for the stone obtained. Out of this demise were reserved and excepted "all timber-trees, trees likely to become timber, saplings, and all other wood and underwood, which then were, or which should at any time thereafter be, standing, growing, and being on the premises, and all mines, minerals, &c., which should thereafter be opened and found." And the lease contained a covenant "not to commit any waste, spoil, or destruction, by cutting down, lopping, or topping any timber-trees, or trees likely to become timber, saplings, or any other wood or underwood;" and a power of re-entry, for non-payment of rent, or if the lessee, &c., should commit any waste, spoil, or destruction by any of the means or ways aforesaid, and should not perform and keep all and singular the covenants, &c., contained in the lease.

The assignee of the term having cut down and grubbed up certain saplings, wood and underwood, for the necessary purpose of working a quarry on the demised premises:—

Held, that the effect of the covenant was, that the tenant should not so cut any of the trees excepted, as that such cutting should amount to an excess of the right which it was intended that he should exercise; and therefore that cutting trees in a manner necessary to a reasonable exercise of the power to get the stone, was no breach of the covenant.

THIS was an action of ejectment, brought by the plaintiff as assignee of the reversion, to recover possession of a farm and premises called Graig Galva, *in the county of Glamorgan. The defendants were [*895 assignees of an unexpired term of ninety-nine years, granted by Evan Jones to one Thomas Thomas, by an indenture of lease bearing date the 29th of July, 1835.

By that indenture, the lesser demised to the lessee the farm and tenement called Graig Galva, and the quarries of paving and tile-stone in and upon the premises, with liberty and power to open and work the quarries, subject to an annual rent for the premises, excepting the quarries, of 16*l.* a year, and to the payment of 2*d.* for every yard of paving-stone obtained, and of 8*s.* for every thousand of tile-stones,—payable on the 2d of August in every year.

Out of this demise, there was, by the deed, a reservation and exception of all timber-trees, trees likely to become timber, saplings, and all other wood and underwood which then were, or which should at any time thereafter be, standing, growing, and being on the premises, and all mines, minerals, and fossils whatsoever, which should thereafter be opened and found. And in the lease was contained a covenant on the part of the lessee, not to commit any waste, spoil, or destruction, by cutting down, lopping, or topping any timber-trees, or trees likely to become timber, saplings, or any other wood or underwood; and then followed a proviso giving a power of re-entry, if the rent should be in arrear as therein mentioned, or if the lessee should commit any waste, spoil, or destruction, by any of the means or ways aforesaid, and should not perform and keep all and singular the covenants, provisos, and agreements contained in the lease.

The cause was tried before WIGHTMAN, J., at the Glamorgan summer assizes, 1848.

On the part of the lessor of the plaintiff, it was insisted that the defendants had incurred a forfeiture, by cutting down and grubbing up certain saplings, wood, and underwood, contrary to the covenant.

*896] *It was conceded that the acts complained of had been done for the purpose of working a quarry on the demised premises. And it was submitted, on the part of defendants, that, if this amounted to a breach of covenant, the lease would be insensible, for the demise of the quarries would then be futile; and that all that the covenant in question was intended to provide against, was, *wilful waste*.

A verdict was found for the plaintiff; leave being reserved to the defendants to move to enter a verdict for them, if the court should be of opinion that there had been no breach of covenant.

John Evans, in Michaelmas term, 1848, accordingly obtained a rule nisi. He referred to *Pomfret v. Ricroft*, 1 Wms. Saund. 321, and the authorities cited in the notes there; and also to *Goodright d. Peters v. Vivian*, 8 East, 190, where it was held, that, if trees be excepted out of a demise, waste cannot be committed by cutting them down; and therefore ejectment cannot be brought as for waste committed in or upon the demised premises.

W. H. Watson and Grove, in the last term, showed cause. There is no such implied exception as is suggested on the part of the defendants, viz. that the lessee may cut down trees, underwood, and saplings, for the purpose of working the quarries. The word "waste" is not used in its strictest sense: the meaning of the covenant is that the lessee shall not cut the excepted trees, &c. The wood, underwood, and saplings, and so much of the land as is necessary for their support and nutrition, are excepted out of the demise. *Goodtitle d. Peters v. Vivian* has no application. [MAULE, J.—The only distinction I can see between

*897] *that case and the present, is, that there the trees were not *grubbed up*.] In *Legh v. Heald*, 1 B. & Ad. 622, it was held, that, by a lease of a tenement, described as containing nineteen acres, save and except all timber-trees, wood, underwoods, &c., six acres of the soil, which at the time of the lease were covered with growing wood, were not excepted, but passed to the lessee. Lord TENTERDEN said: "In the lease there was an exception of wood and underwoods; and it is said, that, by that exception, the soil on which the wood was growing, was excepted, and, consequently, that it was in the plaintiff, and that he therefore was entitled to maintain trespass for any injury done to the surface; and *Whilster v. Paslow*, Cro. Jac. 487, was cited in support of that position. That was a lease of the site and demesne of a manor, '*exceptis et semper reservatis omnibus boscis, subboscis*,' &c.; and it was held that the soil itself was excepted, though it was said, that, by an exception of timber-trees, no soil is excepted but that in which they grow. The distinction is somewhat nice." PARKE, J., said: "The general proposition is, that, if there be a grant of a manor, with an

exception of woods, the soil itself on which the wood grows, is excepted; but a distinction is taken between an exception of *wood and underwood*, and an exception of *all timber-trees*; for, in the first, the soil itself on which the wood and underwood grow, is excepted; but, in the latter case, no soil is excepted, but only nutriment out of the land sufficient for vegetation and growing of the trees excepted: *Whilster v. Paslow*." And TAUNTON, J., added: "It is clear, in point of law, that, under the term wood, used in a grant as synonymous with the latin word *boscus*, the trees and soil on which they grow will pass; and the word wood, or *boscus*, there denotes land covered *with wood: Co. Litt. 4 b; *Whilster v. Paslow*. In *Liford's case*, 11 Co. Rep. 49 b, 'a difference was taken between a wood, which may be demanded in a præcipe by the name of so many acres of wood, and trees growing out of any wood, which cannot be demanded in a præcipe by any name but by the name of land and pasture, &c., where they grow; for, if such a wood, whereof a præcipe lies, is parcel of my manor of G., and I lease my manor, excepting woods, thereby the soil itself is excepted; and, in a præcipe brought of the manor, an exception ought to be of *so many acres of wood*; but, in such case, if I except all my trees which grow out of any wood but upon land and pasture, there, by the exception of the trees, the soil itself is not excepted, but sufficient nutriment out of the land is reserved to sustain the vegetative life of the trees, for, without that, the trees which are excepted, cannot subsist.' The doctrine there laid down, is not inconsistent with *Pincomb v. Thomas*, Cro. Jac. 524: there, one let a teneement, a close whereof was a wood, and commonly known by the name of a wood; and in the lease was an exception of all saleable woods now growing, or which shall grow hereafter, which have been sold by the lord of the premises, *with free entry, egress, and regress, for felling, marking, and carrying off the same*, at all convenient times; and the question was, whether the soil of the wood passed to the lessee: it was holden that the soil did not pass, but the timber only. That clearly was, because the right of entry would not have been needed if the whole soil had been reserved. That case turned, therefore, upon the particular language of the gift. Here, the language of the exception is, 'all timber-trees and other trees, and wood and underwoods,' not *woods*. The word *wood*, as here used, is not synonymous with the latin word **boscus*; it im-ports only the timber or material itself, and, consequently, does not include the soil." The trees gone, the soil belongs to the lessee: if so, by grubbing them, he is guilty of waste; for, he changes the nature of the land. In *Phillipps v. Smith*, 14 M. & W. 589, ALDERSON, B., delivering the judgment of the court, says: "The principle upon which waste depends, is well stated in the case of *Lord Darcy v. Askwith*, Hobart, 234, thus,—'It is generally true that the lessee hath no power to change the nature of the thing demised; he cannot turn meadow into arable, nor stub a wood to make it pasture, nor dry up an ancient pool

or piscary, nor suffer ground to be surrounded, nor destroy the pale of park, for then it ceaseth to be a park; nor he may not destroy the stock or breed of anything, because it disinherits and takes away the perpetuity of succession, as, villeins, fish, deer, young spring of woods, or the like.' Thus, the destruction of germens, or young plants destined to become trees (Co. Litt. 43), which destroys the future timber, is waste; the cutting of apple-trees in a garden or orchard, or the cutting down a hedge of thorns (Co. Litt. 53 a), which changes the nature of the thing demised; or the eradicating, or the unseasonable cutting, of white-thorns (Viner's Abr. *Waste* (E.)), which destroys the future growth, are all acts of waste." In Co. Litt. 54 b, it is said: "A man hath land in which there is a mine of coals, or of the like, and maketh a lease of the land (without mentioning any mines) for life or for years; the lessee, for such mines as were open at the time of the lease made, may dig and take the profits thereof; but he cannot dig for any new mine that was not open at the time of the lease made, for that should be adjudged waste. And, *900] if there be open mines, and the owner make a lease of *the land, with the mines therein, this shall extend to the open mines only, and not to any hidden mine: but, if there be no open mine, and the lease is made of the land, together with all mines therein, there the lessee may dig for mines, and enjoy the benefit thereof, otherwise those words should be void." It is said, on the other side, that there is an implied exception in the covenant not to commit waste, viz. except it be done for the purpose of working the quarries. No such exception, however, can be imported into this lease. The demise is, not of a quarry simply, but of a messuage or tenement, together with the quarries.

Assuming, then, that there has been a breach of covenant, the only remaining question is, whether the covenant is annexed to the reversion, under the statute 32 H. 8, c. 34, so as to entitle the lessor of the plaintiff to maintain ejectment. The authorities show that it is: *Spencer's case*, 5 Co. Rep. 16 b (2d resolution), 1 Smith's Leading Cases, 22; *Mayor of Congleton v. Pattison*, 10 East, 180; *Kingdom v. Nottle*, 1 M. & Selw. 855; *Jones v. King*, 4 M. & Selw. 188; *Vernon v. Smith*, 5 B. & Ald. 1; *Vyvyan v. Arthur*, 1 B. & C. 410, 2 D. & R. 670; *Sampson v. Easterby*, 9 B. & C. 505, 4 M. & R. 422; (a) *Easterby v. Sampson*, 6 Bing. 644, 4 M. & P. 601; *Raymond v. Fitch*, 2 C. M. & R. 588, 5 Tyrwh. 985; *Hemingway v. Fernandes*, 13 Simons, 228.

John Evans, and *Gray*, in support of the rule. It clearly was the intention of the parties to this demise, that the lessee should do that which has been done here. It was not possible that he could enjoy the subject-matter of the lease, viz. the quarries, without grubbing *up *901] a portion of the underwood. In *Doe d. Jones v. Crouch*, 2 Campb. 449, it was held that a covenant in a lease, to deliver up at the end of the term all the trees standing in an orchard at the time of the demise,

(a) And see 4 M. & R. 426 (c), 419 (c); 5 M. & R. 200; 2 N. & M. 45; 5 Man. Gr. & S. 464.

"reasonable use and wear only excepted," is not broken by removing trees decayed and past bearing, from a part of the orchard which was too crowded. One of the main objects of the demise, was, to enable the lessee to get at the stone. Where a man grants a thing, he impliedly grants everything that is necessary to the enjoyment of the thing granted. The covenant not to commit waste "by cutting down, lopping, or topping any timber-trees, or trees likely to become timber, saplings, or any other wood or underwood," is not inconsistent with, nor does it necessarily limit, the privilege conferred by the grant. That covenant would be left to its full operation upon all the rest of the farm. The whole deed must be read together, and a reasonable interpretation given to every part of it.

Goodright d. Peters v. Vivian is a distinct authority upon the other point.

Our. adv. vult.

WILDE, C. J., now delivered the judgment of the Court.

The lessor of the plaintiff in this case sought to recover possession of certain premises in the county of Glamorgan, under a power of re-entry contained in a lease of the premises in question; the lessor being seised of the reversion of the premises, and the defendant being the assignee of an unexpired term of ninety-nine years, granted by Evan Jones to Thomas Thomas.

The lessor claimed to be entitled to enforce the right of re-entry, upon the ground of forfeiture, by reason *of a breach of one of the covenants contained in the lease. [902

The lease was dated the 29th of July, 1835: and the lessor thereby demised a certain farm and tenement called Graig Galva, and the quarries of paving and tilestone in and upon the premises, with liberty and power to open and work the quarries, subject to an annual rent for the premises, excepting the quarries, of 16*l.* a year, and to the payment of 2*d.* for every yard of paving-stone obtained, and of 8*s.* for every thousand of tile-stones; both reservations being payable on the 2d of August in every year. And by the lease there was reserved and excepted out of the demise, all timber-trees, trees likely to become timber, saplings, and all other wood and underwood, which then were, or which should at any time thereafter be, standing, growing, and being on the premises, and all mines, minerals, and fossils whatsoever which should thereafter be opened and found: and the lease contained a covenant not to commit any waste, spoil, or destruction, by cutting down, lopping, or topping any timber-trees, or trees likely to become timber, saplings, or any other wood or underwood; and then followed a proviso, giving a power of re-entry, if the rent should be in arrear as therein mentioned, or if the lessee should commit any waste, spoil, or destruction, by any of the means or ways aforesaid, or should not perform and keep all and singular the covenants, provisoes, and agreements contained in the lease. The

habendum was, of the lands, and also the quarries of paving and tile-stones, for ninety-nine years.

The lessor insisted that a forfeiture had been incurred, by the cutting down of certain saplings, wood, and underwood, contrary to the covenant: and it was admitted between the parties, that the acts complained *903] of had been done for the necessary purpose of working *a quarry on the demised premises: and although various other questions were raised and argued between the parties, the great and material point in contest was, whether the cutting down, for the purpose of working the quarries,—which was admitted to have taken place in this case,—was a breach of the covenant; and it will not be necessary, for the purpose of deciding the case, to consider any other question.

That question depends upon the true construction of the covenant of which the lessor contends a breach has been committed: and, in considering the true construction, the first point to be ascertained, is, the object and intention of the parties, as it is to be collected from the entire deed; and then to consider if the covenant can be construed to have such a meaning as will, regard being had to all the words of it, effectuate the intention of the parties.

The words of the covenant in question are peculiar, and therefore may probably have been used for a purpose applicable to the special circumstances of the case. The covenant is not to be construed as if it were simply that the lessee should not commit waste; for then it would not include the trees excepted, and would apply to cases in which there would be a remedy without the covenant: nor is it to be construed as a general unqualified covenant not to cut down the trees excepted,—which would apply to all trees excepted, though absolutely necessary to be cut down, to enable the lessee to get any stone, and would be inconsistent with the power to get stone: nor is it to be construed as a covenant not to cut trees excepted, so as to amount to waste, in the strict technical sense of that word. The first and second of these constructions would be contrary to the manifest intent of the parties; and each of them would *904] apply to part of the words of the covenant only, *requiring the rejection of other words of equal importance: and the third would make it wholly inoperative.

It being clear that none of these constructions can prevail, some other is to be sought: and it seems to us that the right construction of the two parts of the covenant not to commit waste *by* cutting trees, &c., is to be attained by allowing the first part of it to restrain the second, and the second to expound the first: so that its effect shall be, that the tenant shall not so cut any of the trees excepted, as that such cutting shall amount to an excess of the rights which it was intended the tenant should exercise. Such an excess, by cutting trees demised, is waste in its strict sense; and, where it is committed on trees excepted, we think it is sufficiently analogous to waste, to bring it within the meaning of that word

as used in this covenant,—in which the word waste cannot be strictly construed.

This construction of the covenant will account for the peculiar language in which it is expressed, will give a reasonable sense to all the words of the covenant, and will prevent any inconsistency or discrepancy between different parts of the lease.

It follows, that cutting trees in a manner necessary to a reasonable exercise of the power to get stone, is no breach of the covenant; and therefore a nonsuit must be entered. Rule absolute accordingly.

***VINCENT v. The Bishop of SODOR and MAN and Others. [*905
Nov. 12.**

Certain estates were settled by deed, to the use of such person or persons, in such parts, shares &c., as S. S. should by deed, as therein mentioned, or by her last will and testament in writing, or any writing purporting to be, or in the nature of, her last will and testament, "to be by her *signed and published* in the presence of, and attested by, two or more credible witnesses, direct or appoint."

S. S. made a will, which was signed and sealed by her in the presence of two witnesses, to whom she at the time declared it to be her last will and testament. The attestation clause was thus:—"signed and sealed in the presence of A. B., C. D.:"—

Held, that this was a sufficient "publication," and consequently that the power had been well executed.

THE following case was sent by Vice-Chancellor WIGRAM for the opinion of the judges of this court:—

Prior to, and in contemplation of, the marriage then intended, and shortly after solemnized, between the Rev. John Ireland, clerk (and afterwards Dean of Westminster), deceased, and Susanna Short, spinster, also deceased, by indentures of lease and release and settlement,—the release and settlement bearing date the 28th of January, 1794,—a certain freehold estate held for certain lives still in existence, and limited in its creation to the lessee, his executors, administrators, and assigns, was conveyed to the trustees of the said settlement, their executors, administrators, and assigns, to certain uses in favour of the said John Ireland and Susanna Short, and their issue, which have since failed; and, after the determination thereof, to the uses following, that is to say, to the use of such person or persons, in such parts, shares, and proportions, manner and form, and for such ends, intents, and purposes, and under and subject to such powers, provisos, and limitations, as the said Susanna Short should, at any time or times during, and notwithstanding her intended coverture, by any deed or deeds, writing or writings, with or without power of revocation, to be by her sealed and *delivered in the presence of, and attested by, two or more credible witnesses, or by [*906 her last will and testament in writing, or any writing purporting to be, or

in the nature of, her last will and testament, to be by her signed and published in the presence of, and attested by, the like number of witnesses,—and which deed or deeds and will she was thereby authorized to make and execute, notwithstanding her said intended coverture—direct or appoint; and in default of, and subject to, such direction or appointment, to the use of the said John Ireland, his executors, administrators, or assigns, for their own use and benefit, and to no other use and intent or purpose whatsoever.

The said Susanna Ireland, formerly Susanna Short, made and executed her last will and testament in writing, or appointment in writing in nature of a will, dated the 17th of February, 1826, whereby she devised the estate comprised in the said settlement, after the death of her said husband, to certain of her relations in her said will named. And she appointed her executors, and concluded her said will in the words and figures and form following, that is to say,—

“I appoint for executors of this my will, the Rev. Thomas Vowler Short, the Rev. William Short (my two nephews), and Ralph Barnes, Esq., attorney-at-law, executor.

“Feb. 17th, 1826.

“SUSANNA IRELAND. (L. S.)

“Signed and sealed in the presence of

“HUMPHREY PRITCHETT, Apothecary, 18 Great Queen St. Westminster.

“MARY EAMES, housekeeper to Mrs. Ireland.”

The said Susanna departed this life on the 1st of November, 1826, and in the lifetime of her said husband, without having altered or revoked her said will,—which has been duly proved, pursuant to an order of Her Majesty in Council, made on the 4th day of March, *1847, confirming a report of the Judicial Committee of the Privy Council, in a case of appeal from a sentence of the Prerogative Court of the Archbishop of Canterbury.

The said John Ireland has also departed this life.

In a suit which is depending in the Court of Chancery between the executors of the said John Ireland, and the executors of the said Susanna Ireland, and other persons interested in their respective estates, it has become necessary to determine whether the said will of the said Susanna Ireland is a valid exercise of the power of appointment of the said estate, which was so given or limited to her by the said release and settlement of the 28th of January, 1794, as aforesaid.

Humphrey Pritchett, one of the attesting witnesses to the said will of the said Susanna, departed this life on or about the 16th of August, 1828, leaving Mary Eames, the other attesting witness to the said will, him surviving,—who is still living.

Certain witnesses were examined in the said appeal, and their testimony has been made evidence in this cause; and, by the testimony of two of such witnesses, the handwriting of the said Humphrey Pritchett was proved.

The said Mary Eames, one of such witnesses, deposed as follows:—

“Third. To the third article.—I lived as housekeeper with Mrs. Ireland, the deceased in this cause, from the 19th of March, 1817, until her death, on the 9th of December, 1826. During that period, I acted as housekeeper to her husband, the late Dr. Ireland, and herself; and I always attended upon the deceased, and was her confidential servant. Between Christmas, 1825, and the 17th of February, 1826, the deceased said to me several times, that she should make her will, and that the dean (meaning her husband, Dr. Ireland, who *was Dean of West-
minster) wished her to make her will. The said deceased [908
suffered from dropsy; and, after Christmas, 1825, she was under the impression that she should not live very long. Immediately prior to the said 17th of February, the deceased said to me, ‘Eames, I shall make my will; but I cannot write it all at once,’—from which I infer (though I have no further knowledge of the fact) that she was occupied more than one day in so doing, exclusive of the said 17th of February. At about 10 o’clock in the morning of that day, I went to the deceased, in the drawing-room of the deanery-house, Westminster, where she and the dean were then residing, to receive orders for her dinner: and she then said to me,—‘Eames, I have a right to make my will, under my marriage-settlement;’ adding,—‘Do not go out of the way this morning, as I shall want you to sign it.’ At about between 12 and 1 o’clock that day, Mr. Pritchett, the deceased’s medical attendant (and who was in attendance on her as such at that time), called on the deceased, and saw her in the drawing-room. I thereupon went in the drawing-room to the deceased and Mr. Pritchett. The deceased had told me in the morning at 10 o’clock, that she should want me to sign her will when Mr. Pritchett came; and that was the reason why I then went up to the drawing-room. I went into the drawing-room at the same time that Mr. Pritchett did so: and the deceased, thereupon, addressing both of us, said,—‘I wish you to sign my will, as I have the power of making my will under my marriage-settlement,’ or words to that effect. Mr. Pritchett then sat down; and I stood at the table. The deceased, who was sitting at the table, with her will before her, then finished her will, by writing two or three lines at the end of it. I think she must have written as much as two or three lines; for, it took her some little time to do it. As soon as *the deceased had finished writing, she said to Mr. Pritchett and
me,—‘Look, and see me sign my will.’ She then wrote her name [909
at the end of her will. She then put her finger on the seal on the will, and said to us,—‘This is my last will and testament.’ I have left out one word; for, what she thus said to us was,—‘I declare this to be my last will and testament.’ The deceased then asked Mr. Pritchett to sign her will; and he did so. Then she asked me to sign her will; and I signed it after Mr. Pritchett: and, as I was doing so, Mr. Pritchett asked me to name that I was Mrs. Ireland’s housekeeper; and I did so.

by adding the words,—‘Housekeeper to Mrs. Ireland,’—to my signature on the will. As soon as this was done, the deceased folded up the will, and enclosed it in a piece of writing paper, and sealed it up, and wrote on the paper thus enclosing it, ‘My will,’ and placed it in her writing-desk; saying to me, as she did so,—‘When I am dead, Eames, tell the dean where to find my will.’ Mr. Pritchett then asked the deceased how she was, and, finding that she had had nothing at that moment to say to him about her health, took his leave. I remained with the deceased a short time afterwards, and she gave me some domestic orders, after which I also left her, and went down stairs. No one was present on the occasion, besides the deceased, Mr. Pritchett, and myself. The deceased was of perfectly sound mind at the time, and perfectly capable of making her will. She, at that time, and at all other times of my acquaintance with her, until within a fortnight of her death, used to manage her household affairs, and to settle her weekly bills with me in the most correct manner possible: and I then, and at all other times of my acquaintance with her, considered her perfectly capable of managing her own affairs. There was some sealing-wax on the will before I saw *910] it; and, when the deceased sealed it, as I *have deposed, she put a little more sealing-wax on it, using for that purpose a small taper which stood on the drawing-room mantel-piece; and, in the sight of Mr. Pritchett and myself, she made the impression of her initials on the sealing-wax, with a small seal hanging to her watch, but rather larger, perhaps, than the seals which ladies use at the present day. She then put her finger on the seal on the will, and said to Mr. Pritchett and myself, ‘I declare this to be my last will and testament,’ as I have already deposed. The will now produced to me by the examiner, marked with the letter A. (the same being the articulate script, marked A., propounded in this cause), is the very will of which I have been deposing. The same was executed by the said deceased on the aforesaid 17th of February, 1826, the day of the date thereof, in my presence, as I have now deposed. The name and addition, ‘Mary Eames, housekeeper to Mrs. Ireland,’ appearing subscribed on the said will as those of an attesting witness thereto, are my name and addition, and of my handwriting and subscription.

“Fourth. To the fourth article,—I have seen the deceased write and subscribe her name on very many occasions. I saw her write as often as three or four times a week, on an average, during the whole period of my being in her service. I am well acquainted with her handwriting. I have now inspected her aforesaid will. The whole body, series, and contents of it appear to me to be of her handwriting; and I have no doubt that they are so. The names ‘Susanna Ireland’ subscribed thereto appear to me also to be of her handwriting and subscription; and I should have known them to be such, independently of having seen the deceased subscribe the same, as I have deposed. The date thereof,

'February 17th, 1826,' &c., appear to *me also to be respectively of the handwriting of the deceased; and I have no doubt that they are so." [*911]

The same witness, examined on the interrogatories:—

"First.—It is nineteen years since the death of Mrs. Ireland, the deceased in this cause. She did die in the same year in which she signed the paper in question in this cause. She lived for near nine months after having signed that paper. At the time I affixed my name to that paper, I did not know that it was of a testamentary nature. I first mentioned that I had signed such a paper, to a young woman, then my fellow-servant, named Frances Goodall. I mentioned it to her at the time, as we were together in the deceased's house. The deceased published the paper or script propounded, as her last will, by saying to Mr. Pritchett and myself (as deposed in chief), 'I declare this to be my last will and testament,' as she put her finger on the seal of it, as pre-deposed. Those were the words made use of by her, signifying her publication of it. I did not see the deceased write that paper. I saw her write only two or three lines at the conclusion of it, as I have deposed. I did not, at the time I put my name to it, know its contents; but, on the following day, the deceased told me 'that she had left her money to her own family.' I can recollect that the deceased, on the occasion of her signing the paper in question, said to Mr. Pritchett and myself,—'You look and see me sign my name.' She so expressed herself before she subscribed her name to the said paper; and immediately afterwards she repeated the same thing, by saying to us,—'You have seen me write my name,' as she asked us to sign the will as witnesses. My fellow-subscribing witness, Humphrey Pritchett, was present when she so expressed herself.

"Second. The paper propounded in this cause was sealed in my presence. It was sealed by the deceased. *Sealing-wax was affixed on it as a seal, before the deceased subscribed her name; and, [*912] again, after she had done so, she made a fresh seal on it, and impressed the initials of her name on the wax with her seal. She made the fresh seal by putting more sealing-wax on the will, on the same place where the sealing-wax had been previously affixed. She then sealed the will, by putting her finger on the seal, and saying to Mr. Pritchett and myself,—'I declare this to be my last will and testament,' as I have deposed in chief. The said Humphrey Pritchett was present when the paper was so sealed. I have never been again shown the said paper. The interlineation 'and sealed,' appearing in the attestation clause, was written in my presence by the deceased, before I and my fellow subscribing witness signed our names to the said paper. I remember perfectly well that the deceased said,—'Oh! I have omitted putting *sealed*,' and that she put in the words 'and sealed,' as they now appear in the said will. She did that after she had signed, sealed, and published the will herself, and before Mr. Pritchett and I signed it. When she asked us to sign it, she read

over the words 'signed in the presence of' (appearing on the said will) to Mr. Pritchett, for him to tell her if they were correct; and thereupon it was discovered that she had omitted the word 'sealed.' "

The question for the opinion of the court, is,—whether the said Susanna Ireland's will, or appointment in the nature of a will, was a due execution of the said power of appointment so limited or given to the said Susanna Ireland by, and contained in, the said indenture of release and settlement of the 28th of January, 1794.

The case was argued in Hilary term last.

Malins (with whom was *Crowder*), for the plaintiff. By the terms of *913] this power, its execution is to be by *will signed and published, and attested, by two or more credible witnesses. Whether "publication" is or is not capable of definition, it is, at all events, something so substantial, that, if the power requires that the will shall be published, not only must it be published, but the publication must be attested; and, not only must the prescribed formalities be complied with, but the fact of their having been complied with must appear upon the face of the instrument. In *Wright v. Wakeford*, 4 Taunt. 213, a power to trustees, with the consent of the *cetteux que trust*, testified by writing under their *hands and seals*, attested by two or more credible witnesses, to make sale of lands, was held (by HEATH, LAWRENCE, and CHAMBER, JJ., against the opinion of Sir JAMES MANSFIELD, C. J.), not to be well pursued by an instrument only *sealed and delivered* in the presence of the two witnesses. And that decision was followed by the Court of King's Bench in *Doe d. Mansfield v. Peach*, 2 M. & Selw. 576, and *Wright v. Barlow*, 3 M. & Selw. 512. And the rule being considered to be so settled as to be beyond judicial interference, the legislature interposed to remedy, to some extent, the inconvenience that was found to arise from it; and, by the 54 G. 3, c. 168, s. 1,—reciting that "whereas powers, authorities, and trusts are, in many cases, required to be executed by deeds or instruments *signed* by or under the hands of the persons executing the same, or persons consenting to, or directing, acts respecting such powers, authorities, and trusts, are frequently required to signify such consent or direction by deeds or instruments signed by them, or under their hands, and it has been the ordinary practice, in the memorandum of attestation of deeds, to express the facts of *sealing and delivery* only: *914] and whereas doubts have *arisen respecting the validity of deeds or instruments so attested and requiring signature, although the same may have been actually signed by the person whose signature is required thereto, and the titles of many purchasers, and of other persons claiming under such instruments, may be defective, for want of the insertion of the word 'signed,' or some word to that effect, in the memorandum of attestation thereof: and whereas it is expedient that the titles of purchasers and other persons should not be disturbed, merely on account of the omission to express the fact of signature in the memoran-

dum of attestation of any such deed or other instrument already made,"—it is enacted "that every deed or other instrument already made with the intention to exercise any power, authority, or trust, or to signify the consent or direction of any person whose consent or direction may be necessary to be so signified, shall (if duly signed and executed, and in other respects duly attested) be, from the date thereof, and so as to establish derivative titles, if any, of the same validity and effect, and no other, at law and in equity, and provable in like manner, as if a memorandum of attestation of *signature*, or being under hand, had been subscribed by the witness or witnesses thereto; and the attestation of the witness or witnesses thereto expressing the fact of sealing, or of sealing and delivery, without expressing the fact of signing, or any other form of attestation, shall not exclude the proof, or the presumption, of signature." But, down to the present hour, where a power is to be exercised by deed or instrument *inter vivos*, attended with the three formalities of signature, sealing, and delivery, an attestation of two of them only is insufficient. This doctrine, it must be conceded, has in some instances worked injustice, which has very properly been remedied by the 13th section of *the recent wills act, 7 W. 4 & 1 Vict. c. 27.(a) If "publication" means nothing, why should the legislature enact that no [*915 publication shall in future be required, beyond what is there prescribed? Whatever publication may be, it is at all events essential,—at least, so Sir V. GIBBS seems to have thought, in *Moodie v. Reid*, 7 Taunt. 855,—that the fact of the paper being a testamentary paper, should be communicated to the attesting witnesses. That the will in this case was signed, is clear; and there is no doubt that it was published in fact: but there is no attestation of the latter requirement. In *Buller v. Burt*, cited 4 Ad. & E. 15, a married woman empowered by settlement to dispose of personal property, by any deed "*sealed and delivered* in the presence of and attested by two or more credible witnesses," executed an instrument purporting to be a disposition of part of that property in favour of the defendant: the deed was attested thus,—"*Signed and sealed* at Cotton aforesaid, this 18th day of September, 1813. A. B., C. D.:" and it was held that this was not a due execution of the power. *Wright v. Wakeford*, *Wright v. Barlow*, and *Buller v. Burt*, were all cases of *deeds*: *Moodie v. Reid* was the first case in which the question arose upon a *will*. The form of the power in that case is not to be distinguished from that now under discussion. The court, therefore, cannot hold the power to have been well executed here, without distinctly overruling that case. *Mackinley v. Sison*, 8 Sim. 561, is identical with *Wright v. Wakeford*. In *Doe d. Hotchkiss v. Pierce*, 6 Taunt. 402, this court adhered to *Wright v. Wakeford* and *Doe d. Mansfield v. Peach*. There, the attest-

(a) "That every will executed in manner hereinbefore required, shall be valid without any other publication thereof."

*916] ation noticed the *signing*, but omitted the *sealing*, which was *required by the power to be attested; and the power was held not to be well executed; and the case was considered to be not within the act. In *Stanhope v. Keir*, 2 Sim. & Stu. 37,(a) where a power was to be executed by a will, *signed* and *published* in the presence of, and attested by, three witnesses,—it was held that a will concluding with this declaration, “This is my last will and testament,” and expressed to be signed by the testatrix in the presence of the three attesting witnesses, was not a good appointment, the publication not being attested. In *Allen v. Bradshaw*, 1 Curteis, 110, a power in a *feme covert*, to dispose of personal property by will “to be *signed* and *published*, in the presence of, and to be attested by, two or more credible witnesses,” was held not to be sufficiently exercised by a writing purporting to be her will, and to be *signed*, but omitting to state that it was *published* by her in the presence of two witnesses: and in *George v. Rielly*, 2 Curteis, 1, a power in a married woman to dispose of personalty by will “to be *signed* and *published* by her in the presence of, and to be attested by, two or more credible witnesses,” was held not to be duly exercised by an instrument *signed* and *sealed* in the presence of two witnesses, the attestation clause being—“Witnesses to the execution hereof:” and, in both these cases, evidence *aliunde*, that *publication* had taken place, was held to be inadmissible. *M’Queen v. Farquhar*, 11 Ves. 467, and *Warren v. Postlethwaite*, 2 Coll. C. C. 108, which may be relied on for the defendants, are altogether distinguishable from the present case: there, no attestation was required; and it was held that the mere circumstance of there being an attestation clause specifying certain things, did not exclude evidence that

*917] other *things were done besides those which were attested. [V. WILLIAMS, J. The attestation in those cases gave an imperfect history of the transaction.] *Ward v. Swift*, 1 C. & M. 171, *Simeon v. Simeon*, 4 Sim. 555,(b) and *Lempriere v. Valpy*, 5 Sim. 108, all proceeded upon the principle that *delivery* of a will is tantamount to *publication*, and therefore that an attestation of the former was also an attestation of the latter. That shows how tenaciously the courts adhered to *Moodie v. Reid* and *Stanhope v. Keir*. These two last-mentioned cases were cited and commented upon in *Burdett v. Doe d. Spilsbury*, 6 M. & G. 386, 7 Scott, N. R. 66, 10 Clark. & Fin. 340, and not a syllable of objection, not a shade of doubt or suspicion, was thrown upon their authority; for, the observations there made upon *Stanhope v. Keir*, by ERSKINE, J., are not to be understood as impugning its authority, but merely as an expression of that learned judge’s regret that so technical a rule had ever been established. The only remaining cases are, *Mackinley v. Sison*, 8 Sim. 561, and *Bartholomew v. Harris*, 15 Sim. 78. *Mackinley v. Sison*, it is very difficult to deal with. The

(a) And see *Doe v. Keir*, 4 M. & R. 101.

(b) See 1 P. & D. 679.

power there was to be exercised by deed, or by will *signed and published* in the presence of, and attested by, two witnesses: two points were there discussed,—first, whether there was a sufficient reference to the property over which the power was to operate,—secondly, whether the power was well executed in point of form. The first was the main point: the second was disposed of very shortly, without much consideration, and without reference to any of the authorities. It is impossible, therefore, to impute to the Vice-Chancellor an intention to overrule the cases now relied on. If he did so intend, he clearly *came to an erroneous conclusion. In *Bartholomew v. Harris*, [918 a will, in order to be a good exercise of a power, was required to be *signed and published* by the donee, in the presence of, and attested by, two or more credible witnesses: the donee made a will, which was signed by him, and was attested thus:—"We, the undersigned, attest to have seen the above testator sign the above will:" and it was held that this was, in effect, an attestation to the *publication*, as well as the signature of the will, and, consequently, that the power was well exercised. There, however, the whole was one contemporaneous act; and it must have been presumed that the testator had communicated to the witnesses the fact that the document the execution of which they were attesting, was his will. It is not contended on the other side that *signing* is publication; but it will be said that *signing and sealing* together amount to a publication. If, as was held in *Buller v. Burt*, an attestation of the signing and sealing does not attest the delivery of a *deed*, how can it amount to a publication of a *will*? *Mackinley v. Sison* is not to be considered as having been acquiesced in by the House of Lords in *Burdett v. Doe d. Spilsbury*. In the latter case, they, in effect, confirmed *Moodie v. Reid* and *Stanhope v. Keir*.

Humphrey, for the defendants. By the terms of this power, it is the will only that is required to be attested. The case of *Burdett v. Doe d. Spilsbury* is almost identical with the present; the only difference being, that, here, the will was not required to be *sealed*. MAULE, J., there says: "The will, on the face of it, professes to be signed, sealed, and published. Considering this case independently of authority, I could feel no doubt that the will was a good execution of the power, inasmuch as it is signed, sealed, and published in the presence of, and attested by, three witnesses,—which are all the *conditions [919 imposed by the instrument conferring the power; for, I cannot doubt that the substantive to which the participle "attested" is to be referred, is, the *will*, which is mentioned, not signature, execution, &c., which are not mentioned." In *Wright v. Wakeford*, the consent was to be testified by writing under *hand and seal*, and the deed was only *sealed and delivered*. In *Doe d. Mansfield v. Peach*, the power was to be exercised by writing under *hand and seal*, to be duly executed in the presence of, and attested by, two witnesses; and the attestation stated only that the

deed was *sealed and delivered* in the presence of the witnesses. In *Wright v. Barlow*, the language of the power, and the attestation, were the same as in *Doe d. Mansfield v. Peach*. In *Doe d. Hotchkiss v. Pierce*, the power was to be exercised by deed or writing under the donee's *hand and seal*, and attested by two or more credible witnesses; and it was held to be ill pursued by a will apparently under the donee's hand and seal, which seal an attesting witness believed was affixed before execution and attestation,—the attestation not noticing the sealing as well as the signing. There was the omission of a specific ceremony in that case. In *Moodie v. Reid*, the attestation was general, nothing being mentioned except *signing*. In *Stanhope v. Keir*, there was no evidence of the execution: and that case is clearly not consistent with *Burdett v. Doe d. Spilsbury*. In *Hougham v. Sandys*, 2 Sim. 95, the power was to be exercised by the donee, by any writing *under her hand and seal*, attested by one, two, or more credible witnesses, and the deed was *signed and sealed*, but the attestation contained the words *sealed and delivered* only; and the Vice-Chancellor (Sir L. SHADWELL) held the power not to *920] be well executed. That, therefore, was precisely *like the case of *Wright v. Wakeford*. In *Buller v. Burt*, the words of the power were, “by any deed *signed and delivered* in the presence of and attested by two or more credible witnesses;” and a deed thus attested—“*Signed and sealed at, &c., A. B., C. D.*”—was held not to be a due execution of the power. In *Waterman v. Smith*, 9 Sim. 629, a power given to a husband and wife, was to be exercised by them, by any deed or writing under their *hands and seals*, to be by them executed in the presence of and attested by two witnesses; and it was held that a deed which was *signed* as well as *sealed and delivered* by the husband and wife in the presence of two witnesses, was not a good execution of the power, because the attestation clause did not extend to the *signature* as well as to the *sealing and delivery*,—Sir L. SHADWELL, V. C., observing that the case was not distinguishable from *Wright v. Barlow*. In *Simeon v. Simeon*, a power over personal property, was required to be executed by a will *signed and published* in the presence of, and attested by, two witnesses: the donee professed to execute the power, by a will which was signed by her, and she acknowledged her signature to the two witnesses, but did not sign the will in their presence, and the witnesses, at different times, signed an attestation that the testatrix had *signed and delivered* the will in their presence: and it was held, that, though delivery was equivalent to publication, the power was not well executed. In *Ward v. Swift*, premises were conveyed to A. and his wife, after other uses, to such uses as M. S., by her last will and testament in writing, or any instrument in writing in the nature of, or purporting to be, her will, or by any codicil to be by her *duly executed and published under her* *921] *hand and seal, in the presence of, and attested by, three or more credible *witnesses*, notwithstanding her coverture, &c., should

direct, limit, or appoint, &c. : M. S. *signed, sealed, and delivered*, as and for her last will and testament, an instrument which concluded and was attested as follows:—"In witness whereof, I have set my hand and seal hereto, this 5th day of August, 1801, in the presence of the underwritten: *Signed, sealed, and delivered* this 5th day of August, 1801, as the last will and testament of the said testatrix, M. S., who, in her presence, and the presence of each other, have put our names as witnesses thereof. H. F., J. G., R. F.:" and it was held that the power was well executed. *Lempriere v. Valpy* turned upon a different point: but the Vice Chancellor (Sir L. SHADWELL), adverting to *Moodie v. Reid* and the cases there cited, says: "But, even admitting those cases to be law, it appeared, by the evidence in this cause, as well as by the written attestation, that the will was produced and delivered by Mrs. Lempriere. In *Moodie v. Reid*, Lord Chief Justice GIBBS says: 'If the act of the testatrix, in calling on the witnesses to attest her will, be a publication of it, then their attesting that she signed it, attests her publication also; because they attest that by which she publishes it.' His lordship also says, 'I do not know what the publication of a will is. I can only suppose it to be that by which a person designates that he means to give effect to a paper as his will.' And, consistently with what the Lord Chief Justice is reported to have said, my opinion is, that the will in this case, by having been first signed and then delivered to the witnesses by Mrs. Lempriere, in order that they might attest it, has been duly signed and *published* by her, within the terms of the power." What substantial difference is there between signing and sealing, and delivery? Delivery is not essential in the case of a will. Here, the testatrix seals the will, as an additional *ceremony, to show that her mind is complete; and the witnesses attest that this was done [*922 in their presence. If delivery, which is no part of a will, is an attestation of the publication, why should not sealing be so? especially where sealing is not required by the terms of the power? *Mackinley v. Sison*,—which was a decision by the same learned judge who decided *Hougham v. Sandys*, *Simeon v. Simeon*, *Lempriere v. Valpy*, and *Waterman v. Smith*,—is a distinct authority to show that this power was well executed. There, the power was to be executed by deed, or by will *signed and published* in the presence of, and attested by, two witnesses; and its execution was by will which was expressed to be *signed and sealed* only, and attested by three witnesses. His honour says: "The father's will requires that the power shall be exercised by his daughter, either by a deed or instrument in writing to be by her sealed and delivered in the presence of, and to be attested by, two or more witnesses, or by her last will and testament in writing, or any writing purporting to be, or being in the nature of, her last will and testament, to be by her signed and published in the presence of, and to be attested by, the like number of witnesses. Now I find no legal definition or explanation of the meaning of the term 'publication,' and, therefore, if it appears that a testatrix has

produced her will to witnesses, and has signed and sealed it in their presence, and they have attested that she has done so, I must take it that she has published the document in their presence." The language of the power in that case is almost identical with that of this power. In *M'Queen v. Farquhar*, 11 Ves. 467, where the power was to be executed by deed, to be signed and sealed in the presence of witnesses, and the attestation was only of sealing and *923] delivery, though the deed purported to be signed, sealed, and executed,—it was presumed that the signature was in the presence of the witnesses. Here, it was *proved* that the will was signed and sealed and delivered by the testatrix as and for her last will; and the 18th section of the 7 W. 4 & 1 Vict. c. 26, is a legislative declaration that this amounts to a publication. In *Curteis v. Kenrick*, 3 M. & W. 461, 9 Sim. 443, it was held that *delivery* is equivalent to *publication* of a will. There, a married woman had power, under her marriage-settlement, to appoint certain lands to uses, by her last will and testament, "*signed and published* in the presence of, and attested by, three or more credible witnesses:" she made a will containing a devise of all her property real and personal, but not referring to the power: the attestation clause stated the will to be *signed, sealed, and delivered* by the testatrix in the presence of three witnesses whose names were subscribed: and it was held that the power was well executed. It being suggested by counsel in that case that "it is impossible to define what the mere delivery of a will is," PARKER, B., answers,—"*Something whereby the party acknowledges that the instrument is a complete act containing his final mind—that it is no longer ambulatory.*" *Sealing* is surely a more solemn act of the same character. In stating the grounds of the decision in that case, Lord ABINGER says, 3 M. & W. 472: "The law has given no definition of the meaning of the *published*, when applied to a will. It certainly cannot mean that the whole contents of the will should be made known to the witnesses. If it mean anything less than that, there is no reason why delivery should not be publication. Delivery is a publication to those who are *present, *924] of the completion of the instrument, the signing and delivery of which they are called upon to attest. If this case, therefore, were original, we should be disposed to think that *delivery* was equivalent to publication. But there is sufficient authority to be found for this opinion: first, that of Lord Chief Justice GIBBS, in *Moodie v. Reid*; next, that of the Vice Chancellor, in the case of *Simeon v. Simeon*, and also in the case of *Lempriere v. Valpy*; and last, though not least, that of Lord LYNTHURST, and the other members of this court, in *Ward v. Swift*." *Bartholomew v. Harris* is also an authority to show that here the power was well executed. The view now suggested is strengthened by the cases as to publication of awards. In *Brooke v. Mitchell*, 6 M. & W. 473, where an order of reference required that the arbitrator should *make and publish* his award in writing, ready to be delivered to the parties, or such

of them as should require the same, on or before a certain day—it was held, that the award was “published,” and “ready to be delivered,” within the meaning of the order, when it was executed by the arbitrator in the presence of, and attested by, a witness. *Miller v. Brown*, 2 Hagg. Eccl. R. 209, shows the expansive signification of publication. There, a widow having, after the death of her husband, delivered a will, made during coverture, to her executor, for safe custody,—it was held that such delivery, coupled with other recognitions, amounted to a republication, rendering it a new will, of which the executors were entitled to a general probate. Publication is the result of those acts which the law, or the power, requires for the due execution of the will. In *White v. The Trustees of the British Museum*, 6 Bingh. 310, 3 M. & P. 689, it was held that a will of lands subscribed by three *witnesses, in the presence, and at the request, of the testator, [925 was sufficiently attested, within the statute of frauds, although none of the witnesses saw the testator’s signature, and only one of them knew what the paper was. TINDAL, C. J., delivering the judgment of the court, saying,—“When we find the testator knew this instrument to be his will; that he produced it to the three persons, and asked them to sign the same; that he intended them to sign it as witnesses; that they subscribed their names in his presence, and returned the same identical instrument to him; we think the testator did acknowledge, in fact, though not in words, to the three witnesses, that the will was his.” In *Warren v. Postlethwaite*, 2 Coll. C. C. 108, a married woman, having power under her marriage-settlement to dispose of personal estate by a will to be signed and published by her in the presence of two or more credible witnesses, made her will, in pursuance of the power, and signed her name at the foot of it: then followed the signature of three witnesses; and, below those signatures was a memorandum in the handwriting of the testatrix, to the effect that the will had been signed and sealed by her in the presence of the above three witnesses. Upon the examination of the witnesses, after the death of the testatrix, two of them deposed to the testatrix having signed the will in the presence of all the witnesses, but the third stated her belief that the will had been signed before the witnesses entered the room. It was held, that, coupling the memorandum with the testimony of the witnesses, there was sufficient evidence of signing in the presence of the witnesses, or two of them, to satisfy the requisition of the power in that respect; and that the testatrix calling the witnesses to attest her will, sealing it, and declaring it to be her act (which *circumstances were given in evidence), thereby *published* [926 her will within the meaning of the power. The rule “*expressio unius est exclusio alterius*” cannot apply to the attestation. As to the ceremonies attending the execution of deeds, there is no substantial difference between sealing and delivery. *Shep. Touchst.* 54, 57. This case falls precisely within the principle upon which *Burdett v. Doe d.*

Spilsbury was decided by the House of Lords. Even the judges who in that case thought that the judgment of the Exchequer Chamber ought to be affirmed, regretted the existence of *Wright v. Wakeford* and the class of cases which followed it. Mr. Baron PARKE prefaces his opinion with these remarks:—"If the question proposed by your lordships had now arisen for the first time, I feel little doubt that I should have answered it by stating to your lordships that the power was well executed; and that on the ground, that, where the donor of a power requires an instrument to be executed with certain formalities in the presence of, and to be attested by, credible witnesses, he does not require the witnesses to sign a memorandum of attestation expressing that all the formalities were complied with, but simply to put their names to the instrument *as witnesses*: and, if there had been a special verdict, and writ of error, in the case of *Wright v. Wakeford*, and I had been called upon by your lordships to give an opinion on the propriety of that decision, before it had been confirmed by others, I should probably have given my humble advice to your lordships, that it ought to be reversed. The decision, however, in the case of *Wright v. Wakeford* not having been reversed, but, on the contrary, followed in others, none of which have been questioned before the highest tribunal, and having been recognised by an act of parliament, the statute 54 Geo. 3, c. 168, I think myself bound by the authority of *927] that and the *subsequent cases; and, feeling so bound, I regret that I have to answer the question proposed by your lordships in the negative." If even an attestation of publication be necessary, as is urged on the other side, here that ceremony is sufficiently attested.

Malins was heard in reply.

The following certificate was afterwards sent:—

"This case has been argued before us; and we are of opinion that Susanna Ireland's will (or appointment in the nature of a will) *was* a due execution of the power of appointment limited or given to her by, and contained in, the indenture of release and settlement of the 28th day of January, 1794.

"THO. WILDE.

"W. H. MAULE.

"C. CRESSWELL.

"E. V. WILLIAMS."

May 5, 1849.

On the 19th of the same month, Sir JAMES WIGRAM, V. C., after hearing an argument upon the above certificate, said: "In this case, a power was given which might be executed by deed, which I need not refer to, and which also might be executed by will, which was required to be signed and published by the donee, in the presence of, and attested by, two or more credible witnesses. The donee has executed, or attempted

to execute this power, by will, which is signed and sealed in the presence of, and attested by, the requisite number of witnesses, publication not being expressed either in the attesting clause or in the body of the instrument. The cause came on before this court, and a case was sent for the opinion of the Court of Common Pleas; a certificate *has [*928 been returned, in which all the learned judges concur in favour of the valid execution of the power; *but, unfortunately, no reason is assigned for the opinion they have given.* If the case of *Wright v. Wakeford*,—which I mention as the representative of a class of cases,—had never been decided, I should not, I think, have had much difficulty in deciding this case in favour of the valid execution of the power. Again, taking *Wright v. Wakeford*, and the class of cases which it represents, as a sound decision, I should not, I think, have had much difficulty in applying *Wright v. Wakeford* to the present case, if it were not for the subsequent decision of the House of Lords in *Burdett v. Doe d. Spilsbury*, and for the decision of the Vice-Chancellor in the cases of *Mackinley v. Sison* and *Bartholomew v. Harris*. These cases appear to me to have introduced a difficulty as to the proper decision to be come to in the present case, which would not have existed independently of those cases. If the principle on which *Wright v. Wakeford* was decided be this, that the instrument creating the power requires that the attesting witnesses should actually narrate upon the instrument executing the power, what acts of the donee they attest, and that the court, in requiring such a narrative, were merely executing the express direction of the donor, there might not be much difficulty in applying the principle to the present case: but, if that be the principle, it is difficult to see how the court can dispense with the narrative in the case of a general attestation, any more than in the case of a particular attestation. If, however, the language of several of the judges who assisted in the House of Lords in *Burdett v. Doe d. Spilsbury*, and the language of the noble and learned lords who gave their opinions in that case, is to be taken as an exposition of the law, it will be difficult to escape from the conclusion, that, in the case of a general clause of attestation, they thought the narrative might be dispensed *with, to the extent, at least, of holding that a jury might presume [*929 that the witnesses saw those acts done which the donee of the power, in the instrument executing the power, expressed an intention to do, although there be no evidence that the witnesses were cognisant of the contents of the instrument containing the power. Indeed, it would be difficult to escape from the conclusion, that they were of opinion that the witnesses might be examined to prove what acts of the donee they did, in fact, attest,—that is, in the case of a general attestation. Another difficulty has always occurred to me upon the case of *Burdett v. Doe d. Spilsbury*; but which difficulty, looking at the high authority of those who advised on, and decided, that case, I cannot consider as well founded. It is said in that case, that the attesting clause may be read in connexion

with what was called a testimonium clause. That argument supposes the witnesses to have read, or been informed of the contents of, the testimonium clause, which, however, is part of the will, and not of the attesting clause, and of which the attesting witnesses are never presumed to know the contents: and to this must be added the observation, that the testimonium clause in that case of *Burdett v. Doe d. Spilsbury*, mentioned only 'signing and sealing,' and not publishing. The word 'publish' was, indeed, used by the testatrix in that case, Mrs. Skinner, at the beginning of her will; and the witnesses, therefore, must, in that case, have been presumed to have read or known the contents of the whole will: but, at the time the testatrix made use of the word 'publish' she clearly did not do the act which the donor of the power required, for, the substance of the will follows the clause in which the word 'publish' occurs. Mr. Justice MAULE, in addressing the House, suggested, that, according to the true construction of the will in *Burdett v. Doe d. Spilsbury*, all that the donor required, was, that the will should be attested, and not the formalities,—which, he said, would distinguish the case of *Burdett v. Doe d. Spilsbury* from *Wright v. Wakeford*. And the noble and learned lords who gave their opinion in the case, appear to me not to have disapproved of, but to have been disposed to adopt, the distinction suggested by Mr. Justice MAULE; but they distinctly disclaimed putting their decision on that ground. The cases of *Mackinley v. Sison* and *Bartholomew v. Harris* appear to me to be important authorities in support of the certificate in the present case: but it will be difficult to reconcile those cases with the case of *Moodie v. Reid*, and other cases, in which it has been held that the publication is to be a distinct act, and not, as the Vice-Chancellor appears to have thought in *Mackinley v. Sison*, a thing to be inferred from the mere fact that the deed required the witnesses to attest something. *I have not, in the present case, the advantage of knowing on what grounds the learned judges who have sent me their certificate, have decided the present case.* I find myself in this difficulty,—all the opinions given in *Burdett v. Doe d. Spilsbury* appear to me to profess to save whole *Wright v. Wakeford*. I do not even except Mr. Justice MAULE, who evidently felt disposed to think that case ought to be excepted. In *Burdett v. Doe d. Spilsbury*, the word 'publish' was found in the instrument executing the power; and stress was laid upon that circumstance. In this case, the word 'publish' is not found in the instrument executing the power; and I am left in doubt whether the certificate has been founded on the distinction suggested by Mr. Justice MAULE, to which I have already adverted; or whether it has been given upon the authority of *Mackinley v. Sison* and *Bartholomew v. Harris*; or whether it has been given upon the ground,—strongly insisted on in the argument before me,—that the seal of the donee (a formality not required by the donor) was to be deemed a publication; or whether they have proceeded upon any ground which has

not been suggested in argument. Considering that this is a case to be determined by a court of law, it is of very great importance that I should know upon what ground the court of law has proceeded. *I cannot, with any satisfaction to myself, confirm the certificate, without knowing the reasons upon which it is founded:* and I do, though with great reluctance, decide that this case should be sent again to a court of law. I wish the parties, however, distinctly to understand that I do not myself do this upon the ground that I think the certificate may not be supported. The law is really in such a state of uncertainty, that, for me to confirm it in the present instance, would not be adopting the opinion of the court of law, but would be giving an opinion of my own. The case must go to some other court."

The case was accordingly sent for the opinion of the barons of the Exchequer, and was argued on the 8d of May, 1850, by *Malins*, for the plaintiff, and *Humphrey*, for the defendants; and on the 8th of July, that court certified,—as the Court of Common Pleas had done,—that the power was well executed.

In stating the reasons which induced the court to come to this conclusion, ALDERSON, B., said:—"The attestation clause is as follows,—‘Signed and sealed in the presence of Humphrey Pritchett (described) and Mary Eames,’ described also. The question is, whether this is sufficient. It depends upon the state in which the law was left by the case of *Burdett v. Doe d. Spilsbury*, in the House of Lords. We are unable to see how, after that decision, the law, previously considered to be established by the well-known case of *Wright v. Wakeford*, can be considered in force. It seems to us that it was by the decision of *Burdett v. Doe d. Spilsbury*, overruled. If that be so, it is quite clear this *power was well executed. But we are embarrassed by certain *dicta* of the noble lords by whom the decision of *Burdett v. Doe* [*932 *d. Spilsbury* was pronounced,—in which they say they do not mean to overrule *Wright v. Wakeford*, but to leave its authority untouched, and confine their decision to the case where the attestation is general, and omits altogether all mention of formalities required by the power to be attested. But, even if this case be so, we still think this power was well executed. It is conceded that the attestation need not follow the words of the power literally; for, when the power given is to be exercised by signing and publishing a will, by having an attestation of both these formalities, it would clearly be well executed if the attestation expressed that it was signed and delivered: and this was expressly so determined by the court in a case of *Ward v. Swift*, and by the Vice-Chancellor SHADWELL in *Simeon v. Simeon*. Now, what is the principle which governs those decisions? We think it is this,—that, if the attestation expresses, in any form of words, an act to have been done in the presence of witnesses, by which the complete execution of the instrument, as required by the power, appears to have been effected, it would be suffi-

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cient ; but that, when the framer of the power requires two or more such acts to be done, then, if the attestation expresses only the doing of one of them, even though all persons would clearly infer the other act had also taken place, it would not be sufficient ; for, in this latter case, it is clear, the framer of the power really intends something more than the act expressed in the attestation, because he has expressly added the other act. Thus, in this case, he requires both signing and publishing. The signing, therefore, in the presence of witnesses, though it might naturally and reasonably be also called a publishing, will not alone do ; for, he *933] expressly says the will is to be signed in the presence of *witnesses, and also published. But here it is both signed and sealed in their presence. Now, if sealing in the presence of witnesses be naturally and reasonably to be considered as a publication,—and we think it may be so considered,—then we have enough in this attestation to fulfil the whole power ; for, it is signed in the presence of two witnesses, and it is published also, if being sealed in the presence of witnesses amounts to a publication, as both these acts are stated here in the attestation. We therefore think, for these reasons, that this power was well executed, and shall certify accordingly.”

The cause came on again, before Vice Chancellor KNIGHT BRUCE, on the 27th of March, 1851, when the counsel for the defendants asked for the confirmation of the certificate of the Court of Exchequer, and for the costs of the suit. For the plaintiff it was submitted, that, as the law, as appeared from the reasons given by ALDERSON, B., was in an uncertain state with reference to the case of *Wright v. Wakeford*, and as this suit was instituted before the decision of *Burdett v. Doe d. Spilsbury*, no costs ought to be given against the plaintiff. KNIGHT BRUCE, V. C., said:—“I am not aware of any reason or authority for saying that the author of this power meant that there should be a declaration to the witness by Mrs. Ireland of the publication of her will ; nor do I understand what ‘publication’ means. ‘Republication’, is a term well known and understood. A will is published when it is made. The word ‘publish’ is useless or superfluous, or of no meaning. I confirm the certificate. Let the bill be dismissed, without costs up to and inclusive of the certificate of the Court of Common Pleas, and with costs after that time, including the costs of the certificate of the Court of Exchequer.”(a)

(a) See the next case.

*JOHNS v. DICKINSON. Dec. 10.

[*934

A power was reserved to a married woman to dispose of personal property by her last will and testament in writing, to be by her duly made and published in the presence of, and to be attested by, two or more credible witnesses. The donee, by her will, without any reference to the power, or to the subject-matter, bequeathed to her husband "all that she did and should or would thereafter be entitled to, or should possess;" concluding thus:—"Signed by me, E. J., February 24, 1831, in the presence of two witnesses," and then followed the signatures of the two witnesses:—Held, that this was not a due execution of the power.

THE following case was sent by His Honour, Vice Chancellor WIGRAM, for the opinion of this court:—

John Hill, late of East Smithfield, in the county of Middlesex, and of Woodford, in the county of Essex, duly made and published his last will and testament in writing, bearing date the 24th of February, 1812, and thereby gave and bequeathed unto his wife Mary Hill and Thomas Dickinson and John King all his ready money and securities for money, stocks, or sums in the funds, and all the rest, residue, and remainder of his estate and effects, whatsoever, and of what nature, kind, or quality soever, and not thereinbefore given or disposed of, in or to which he might be interested or entitled at the time of his decease.—Upon trust to invest the same upon government securities in the public funds, and from the dividends and interest to pay the said Mary Hill an annuity of 650*l.* during her life, or until her second marriage (the same to be reduced to an annuity of 50*l.* for her life, if she married again); and, subject thereto, the said testator directed that his said trustees should be possessed of the whole of the residue of his personal estate and effects, in trust for all his children who should be living at the time of his decease, or born in due time afterwards, in equal proportions, share and share alike, and to become vested in and payable to them respectively, if males, at the age of twenty-one years, and, if females, at that age, or the *day of marriage. And the said testator directed, that, as soon [935 as his daughters respectively should have attained their age of twenty-one years, or be married, a sufficient part of her share and interest of and in the said trust-moneys in the public funds, should be by the said trustees so settled as to secure to her the certain payment of an annuity or clear yearly sum of 50*l.*, for her life, for her sole and separate use and benefit, and totally exempted from the debts, engagements, power, intermeddling, or control of any person with whom she then had, or should thereafter intermarry, and that her receipts alone should be a full and sufficient release and discharge for the same, notwithstanding her coverture; and that the stock and principal sums whereon and whereby the said annuities to his said daughters respectively should be secured, should and might be at the disposal of each of them his said daughters at and from the time of her decease, and should thenceforth become and be payable to such person or persons, and at such time or times, and in such parts, shares, and proportions, and to and for such

uses, intents, and purposes, and subject to such restrictions and contingencies, and in manner and form, as his daughters respectively, in and by their respective last wills and testaments in writing, *by them to be respectively duly made and published in the presence of, and to be attested by, two or more credible witnesses*, and which will they thereby severally had a power, or were intended to be authorized and empowered, to make, should or might give or bequeath, or order, direct, limit, or appoint the same; and, in default, or for want, of any such gift or bequest, or direction or appointment as aforesaid, then, as to the part or share of the said stocks or securities from the interest or dividends whereof the said annuity became and was payable to the daughter so dying intestate in *936] that respect as aforesaid, the same was to *go and be divided between and among her own lawful issue, if any should survive her, in equal shares and proportions, share and share alike if more than one, and, if but one, then to such only child, with the like benefit of survivorship, and to be payable to them respectively at the age of twenty-one years, and the interest or dividends, or such part thereof as should be necessary, in the mean time to be applied for and towards the clothing, maintenance, and education of such child or children as aforesaid; and, if no such lawful issue her surviving, or, being any, all of them should depart this life under the age of twenty-one years, then the same to go and be divided between and among the lawful issue of his said other children, with the like benefit of survivorship, and to become payable to them respectively in like manner as aforesaid; and, in default of such issue, to go unto his, the said testator's, next of kin, in manner and form as by the statutes of distributions directed.

The said John Hill died in the month of November, 1816; and his said will was duly proved in the prerogative court of the Archbishop of Canterbury, by the said Mary Hill, Thomas Dickinson, and John King, the executors therein named.

Eliza Hill, one of the eight children of the testator, in 1826 intermarried with Joseph Milbank, and the said Joseph Milbank shortly afterwards died, and there was not any issue of the said marriage. The said Eliza Milbank, formerly Eliza Hill, on the 2d of June, 1830, intermarried with William Johns.

Thomas Dickinson and John King, as the surviving executors and trustees of the said testator's said will, in pursuance of the said directions in the said will, invested part of the share of the said Eliza, the wife of the said William Johns, in the residuary personal estate of the *937] said testator, in the purchase of the sum of *1428*l.* 11*s.* 6*d.* new three-and-a-half *per cent.* annuities, in their joint names, the dividends upon which sum produced the yearly sum of 50*l.*

Shortly after the marriage of William Johns, an indenture, dated the 2d of March, 1831, and purporting to be made between the said Thomas Dickinson and John King, of the one part, and the said William Johns

and Eliza his wife, of the other part, was executed by the said Thomas Dickinson and John King,—whereby, after reciting the said will of the said testator, and the facts hereinbefore stated, it was witnessed that the said Thomas Dickinson and John King did, for themselves, their heirs, executors, and administrators, covenant and declare with and to the said William Johns and Eliza his wife, their executors, administrators, and assigns, that they the said Thomas Dickinson and John King, their executors, administrators, and assigns, should and would stand and be possessed of and interested in the said sum of 1428*l.* 11*s.* 6*d.* new 3¼ *per cent.* annuities, invested by them as aforesaid, and which then stood in their joint names in the books of the governor and company of the Bank of England, and of and in the dividends, interest, and annual produce thereof, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, and declarations in and by the thereinbefore-recited will of the said John Hill expressed and declared of and concerning the trust-moneys, stocks, funds, and securities directed to be set apart for the securing of an annuity of 50*l.* for the life of the said Eliza Johns, as one of the daughters of the said testator.

The said Eliza Johns departed this life on the 23d of October, 1841, having previously made and signed a document or instrument in writing, dated the 24th of February, 1831, in the words and figures following:—

“In the name of God, amen. This is the last will *and testament of me, Eliza Johns, the wife of William Johns, woolstapler, [*938 of Chelmsford. I thank God, I am in health both of mind and body; but I think it my duty to make my will, in case I should die before my dear husband, in order to prevent any dispute. I give and bequeath to my dear husband, the said William Johns, woolstapler, of Chelmsford, all that I do and shall or will hereafter be entitled to, or shall possess, at his whole and sole disposal; and I do appoint and fix my dear husband, the said William Johns, woolstapler, of Chelmsford, my whole and sole executor: And may the Lord be with him, and bless him in all his undertakings, is the sincere prayer of his affectionate wife.

“Signed by me, ELIZA JOHNS,

“Feb. 24th, 1831, in the year of our Lord.

“In the presence of two witnesses,

“THOMAS MILBANK, Ironmonger, Chelmsford,

“MARY ANN BARNARD.”

On the 30th of May, 1844, the said William Johns proved the said will of his said wife, in the prerogative court of the Archbishop of Canterbury.

Mary Ann Newell, formerly Mary Ann Barnard, a witness sworn and examined in a suit in the High Court of Chancery, in which William Johns was the complainant, and Thomas Dickinson and others were the defendants, deposed that the said Eliza Johns signed the document pro-

duced and shown to the deponent, and declared it to be her will, at the time it bears date, in the joint presence of the witness and of Thomas Milbank of Chelmsford, Ironmonger; that the witness did not remember that the said Eliza Johns did anything on that occasion, as regarded the said produced document, except that, when she had signed it, and declared it to be her will, she handed it over to Mr. Milbank and the witness to sign it; she at the same time observed that she gave all she might die *possessed of to her husband, and that the witness and *939] the said Thomas Milbank might one day be called upon to prove the paper; that the witness and the said Thomas Milbank then signed their respective names or signatures to the said produced will, as witnesses thereto, in the presence of the said Eliza Johns and of each other; and that the name or signature "Mary Ann Barnard," which is signed to the said will, as one of the witnesses thereto, and which was her then name, was in the witness's own handwriting, and the name or signature "Thomas Milbank," signed to the said will, as the other witness thereto, was of the handwriting of the said Thomas Milbank.

Thomas Milbank, a witness also sworn and examined in the said suit in the Court of Chancery, deposed that the document produced and shown to him was signed by the said Eliza Johns, and declared to be her will, at the time it bears date, in the joint presence of the witness and Mary Ann Barnard, afterwards Mrs. Newell, the wife of John Newell; that the said Mrs. Johns then handed the said document to the witness and the said Mary Ann Barnard, in order that they might attest it; that the witness and the said Mary Ann Barnard then accordingly signed their respective names or signatures to the said produced will, as witnesses thereto, in the presence of the said Eliza Johns, and of each other; and that the name or signature "Thomas Milbank," signed to the said produced will, as one of the witnesses thereto, was of the witness's own handwriting, and the name or signature "Mary Ann Barnard," signed to the said produced will, as the other witness thereto, was of the handwriting of the said Mary Ann Barnard, afterwards Mrs. Newell.

The question for the opinion of the court is, whether the document or instrument of the 24th of February, *1831, was a due execution *940] of the power given to Eliza Johns, as one of the daughters of John Hill, by the said will of John Hill, dated the 24th of February, 1812.

W. Bigg, for the plaintiff. The power here does not require the will to be signed by the testatrix: it is to be "duly made and published in the presence of, and to be attested by, two or more credible witnesses." In *Burdett v. Doe d. Spilsbury*, 6 M. & G. 386, 7 Scott, N. R. 66, 10 Clark. & Fin. 340,—where all the earlier authorities are discussed,—it was held that a power of appointment "by a will to be signed, sealed, and published by A. B., in the presence of, and attested by, three credible witnesses," was well executed by an instrument concluding thus,—
"I declare this only to be my last will and testament. In witness

whereof, I have, to this my last will and testament, set my hand and seal, this 12th of December, 1789 ;" such instrument being signed by A. B., and a seal appearing opposite to such signature, and the words, "Witness, C. D., E. F., G. H.," appearing in the usual place of attestation, and it being shown, by extrinsic evidence, that the instrument was, in fact, so signed, sealed, and published. MAULE, J., in the opinion given by him in answer to the questions propounded to the judges, says : (a) "All that is required to make a good execution by will, is, that the will be in writing, signed, sealed, and published in the presence of, and attested by, three credible witnesses. The jury have found that the will was signed and sealed and published in the presence of three persons whom it names, and that it was attested by them in the manner which appears in the instrument, which is, by writing their names under *the word 'witness.' The will, on the face of it, professes to be signed, sealed, and published. Considering this case independ- [*941] ently of authority, I could feel no doubt that the will was a good execution of the power, inasmuch as it is signed, sealed, and published in the presence of and attested by three witnesses ; which are all the conditions imposed by the instrument conferring the power ; for, I cannot doubt that the substantive to which the participle 'attested' is to be referred, is the will *which is mentioned*, not signature, execution, &c., *which are not mentioned*." [CRESSWELL, J. All the cases upon this subject were cited in *Vincent v. The Bishop of Sodor and Man*, ante, p. 905, where we held a power under similar circumstances to have been well executed. *Younge*. The Vice-Chancellor (Sir JAMES WIGRAM), being disappointed at this court's sending a mere certificate in that case, and giving no reasons for the opinion to which they came, sent another case for the opinion of the Court of Exchequer, which is now pending. (b)] This is, within all the cases, a good exercise of the power. [MAULE, J. The objection here will be, that it does not appear upon the face of the will, that it was *published*.] It is submitted that that *does* sufficiently appear. In *Mackinley v. Sison*, 8 Sim. 561, the testator gave to trustees a sum of 8 *per cents*. in trust for his daughter for life, and, after her decease, in trust for such persons and for such purposes as she should, either by deed, or by her will, *signed and published* by her in the presence of and attested by two witnesses, appoint, and, in default of appointment, in trust for children ; but, if she should leave no child, then in trust for the testator's *other daughters and their children. The daughter, by her will, [*942] which was expressed to be *signed and sealed only*, but which was attested by three witnesses, gave several pecuniary legacies, and directed them to be paid out of the moneys invested *in her name in the 4 per cent. government securities*. The daughter died unmarried. She had no 4

(a) 6 M. & G. 406, 7 Scott, N. R. 85, 10 Clark. & Fin. 360.

(b) The case of *Vincent v. The Bishop of Sodor and Man*, has since been argued in the Court of Exchequer, and a certificate given in conformity with that given by this court, but accompanied by reasons.

per cents. standing in her name, nor was there anything to satisfy the legacies, except the 3 *per cents.* standing in the names of the trustees of her father's will. It was held that the power was not confined to the daughter's children, but was general; and that her will was a due execution of it. The Vice-Chancellor (Sir L. SHADWELL) there says: "I find no legal definition or explanation of the meaning of the term '*publication*;' and, therefore, if it appears that a testatrix has produced her will to witnesses, and has signed and sealed it in their presence, and they have attested that she has done so, I must take it that she has published the document in their presence." So, in *Bartholomew v. Harris*, 15 Sim. 78, a will, in order to be a good exercise of a power, was required to be *signed and published* by the donee, in the presence of, and *attested* by, two or more credible witnesses. The donee made a will, which was *signed* by her, and was attested thus—"We, the undersigned, attest to have seen the above testator sign the above will:" and it was held that that clause was, in effect, an attestation to the *publication* as well as to the *signature* of the will, and, consequently, that the power was well exercised. *Stanhope v. Kier*, 2 Sim. & Stu. 37,(a) and *Moodie v. Reid*, *943] 7 Taunt. 355 (and see 1 Madd. 516),(b) *are, in effect, overruled by *Burdett v. Doe d. Spilsbury*: and, if they are still to be considered as law, they are not inconsistent with the present argument. In *Ward v. Swift*, 1 C. & M. 171, by indenture of lease and release, certain premises were conveyed to A. and his wife, after other uses, to such uses as M. S., by her last will and testament in writing, or any instrument in writing in the nature of, or purporting to be her will, or by any codicil to be by her *duly executed and published under her hand and seal, in the presence of, and attested by, three or more credible witnesses*, notwithstanding her coverture, &c., should direct, limit, or appoint, &c. M. S. signed, sealed, and delivered as and for her last will and testament, an instrument which concluded and was attested as follows:—"In witness whereof, I have set my hand and seal thereto, this 5th day of August, 1801, in the presence of the underwritten, Mary Swift (L. S.) Signed, sealed, and delivered this 5th day of August, 1801, as the last will and testament of the said testatrix M. S., who, in her presence, and in the presence of each other, have put our names as witnesses thereof. H. F., J. F., R. F.:" and it was held that the power was well executed; *delivery* being equivalent to *publication*. Upon these authorities, it is submitted that all has been done here that was required to make this will a good and valid exercise of the power.

(a) Where a power was to be exercised by a will *signed and published* in the presence of, and attested by, three witnesses:—Held, that a will concluding with this declaration—"This is my last will and testament," and expressed to be *signed* by the testatrix in the presence of three attesting witnesses, was not a good appointment, because the *publication* was not attested.

(b) An appointment by will was thus made: "These my last bequeaths, signed by me this 4th of February, 1812. S. M. Witness, B. H. and J. H." The testatrix told each of the witnesses that that paper was her will:—Held, that this was not a sufficient execution of the power.

The next question arises under these circumstances: Eliza Johns had power to dispose of a sum of 1428*l.* 11*s.* 6*d.* new 3½ *per cent.* annuities. By her will she makes a general bequest of the whole of her *property. She being at the time a married woman, her will [*944 could only operate upon this money. [MAULE, J. I do not find that the case negatives her having other property. The general rule is, that, to be an execution of the power, the will or other instrument must refer to the power or to the subject.] If nothing else be shown upon which the will could operate, it will be assumed that it intended to deal with that which was the subject of the power. In *Curteis v. Kenrick*, 9 Sim. 443, 3 M. & W. 461, by a marriage-settlement, freehold lands were conveyed to trustees during the joint lives of the husband and wife, for her separate use, and the other moiety to the husband, and, after the decease of one of them, to the use of the survivor, with remainder to the use of the children of the marriage, with remainder, in default of such issue, if the wife should survive the husband, to the use of her in fee, but, if not, then to such uses, &c., as she, notwithstanding her coverture, by her will, by her signed and published in the presence of, and attested by, three or more credible witnesses, should appoint, and, in default of appointment, to the use of her in fee. The wife died in her husband's lifetime, having made a will which purported to be signed, sealed, and delivered by her, and by which, without referring to any power, she gave all the property of which she was possessed, whether real or personal, and also her reversionary interest or interests in any property or properties whatsoever, to her husband. And it was held that the will was a due execution of the power given to the wife by the settlement. [MAULE, J. Suppose the wife had several powers?] This would be a good execution of them all. [MAULE, J. The affirmative is on the plaintiff: if the matter is left doubtful, the plaintiff must *fail.] *Churchill v. Dibben*, 2 Ld. Ken., 2d part, 68, is also an [*945 authority to show that this is a due exercise of the power.

Younge, for the defendant. The power in this case is to be exercised by a will, to be "duly made and published, in the presence of, and to be attested by, two or more credible witnesses." Mrs. John's will, therefore, which was signed and attested, but not "published," is not a due exercise of the power. In *Moodie v. Reid*, the power was to be exercised by a will "signed and published;" and the appointment was made thus,—"These my last bequeaths, signed by me this 4th Feb. 1812. S. M. Witness, B. H. and J. H.:" the testatrix told each of the witnesses that that paper was her will; and this court held that the will was not a sufficient execution of the power. GIBBS, C. J., there says: "Here, the power is to be exercised by a will signed and published. Therefore, there must be some publication here: the will must be signed, published, and attested; and there must therefore be some attestation here of signing and publication. Though the most respected late chief justice of this

court (Sir James MANSFIELD) differed from the other judges in *Wright v. Wakeford*, 4 Taunt. 213, 17 Ves. 454, it is established by that case, that the witnesses must attest everything that is necessary for the execution of the power. Here, the witnesses have clearly attested the signing: the question is, whether they have attested the other formality, of publication, in attesting the signing. If the act of the testatrix in calling on the witnesses to attest her will, be a publication of it, then their attesting that she signed it attests the publication also, because they attest that by which she publishes it. I called on the bar to say what publication *946] was: I do not wonder that I had no answer; for, though the parties use the term publication, it is a term, in this sense, unknown to the law. I know what publication is, if spoken of many things; as, for instance, of a libel. I know what an uttering is; if a man puts forth base money, in certain cases it is an uttering: but I do not know what the publication of a will is. I can only suppose it to be that by which a person designates that he means to give effect to a paper as his will." It is suggested, on the other side, that that case, and also the case of *Stanhope v. Keir*, are overruled by *Burdett v. Doe d. Spilsbury*. There, however, the will in fact purported to be *published* by the testatrix. Here, there is no evidence of publication at all,—none is mentioned in the attestation: the fact of publication is sought to be supplied by extrinsic evidence. [MAULE, J. Where *signing* is not in terms required, is not the signing in the presence of witnesses a sufficient publication?] After *Burdett v. Doe d. Spilsbury*, it would be difficult to contend that it is not; though it is to be observed that Mr. Baron ROLFE there takes a different position from that assumed by Mr. Justice MAULE. [MAULE, J. But one which is not inconsistent with it. What have you to say on the other point?]

A will of a married woman, to be a good exercise of a power, must either refer to the power which it professes to exercise, or to the subject-matter on which the power was intended to operate,—or it must distinctly appear that there is no other property upon which the will could operate. The authorities on this point are clear and consistent. Thus, in *Nannock v. Horton*, 7 Ves. 391, it was held, that a power of appointment was not executed by a will having no reference to the power, or to the subject of it; and that the *947] court will not inquire into the circumstances of the property. In *Jones v. Tucker*, 2 Meriv. 533, M. M. gave to the defendant all her freehold and copyhold estates, upon trust to permit E. S. to receive the rents, &c., during her life; and, after her death, to sell, and, out of the produce, to pay 100*l.* to such person as she should by will appoint. E. S., by will, without reference to the power, gave 100*l.*, and the whole of her household furniture, to the plaintiff. It was charged by the bill, and not denied, that the testatrix had no personal property, *at the time of her death*, besides some household furniture to a very small amount in value; but no evidence was gone into; and an inquiry was asked as to the state

of the property *at the time of making the will*, with the view of ascertaining that the testatrix *must* have intended the gift of the 100*l.* as an execution of her power. But the inquiry was refused, and the bill dismissed. Again, in *Jones v. Curry*, 1 Swanst. 66, it was held, that the will (attested by three witnesses) of a person having a power to dispose of a fund consisting partly of real estates and partly of household furniture, linen, and plate, containing a gift of "all my estates and effects of whatsoever denomination," and of "my household furniture, with linen and plate,"—was not an execution of the power. And in *Webb v. Honnor*, 1 Jac. & W. 352, a testator, having a general power over a sum in the funds, limited, in default of appointment, to his children, and having no other funded property, bequeathed all his personal estate, "consisting of money invested in any of the public funds, household furniture, &c.:" and it was held, that this was not an execution of the power; and that the circumstance of his having no other funded property, was not to be adverted to, on the question whether the testator was or was not executing the power. *Lovell v. Knight*, 3 Sim. 275, is *precisely in point: there a married woman, having power to appoint [948 leaseholds and stock, by her will, executed and attested as required by the power, but not referring to it, gave to her husband the whole of her property both real and personal, and whatsoever she might possess at her decease: and it was held not to be an execution of the power. The Vice-Chancellor (Sir L. SHADWELL), said: "The question, as it appears to me, is, whether I can take this testamentary instrument to be anything else than a general will by the testatrix, meaning to dispose of all her property, in general terms. Here, there is no specific enumeration of the articles of property intended to be disposed of; but she affects to give 'the whole of my property, both real and personal, and whatsoever I may possess at the time of my decease.' Now, I do not think, that, if this person had intended to dispose of all her property, more comprehensive and general terms could have been selected than are here used: and I apprehend it to be perfectly clear, that, wherever a will is couched in such terms as that, upon the face of it, it appears to express an intention to pass the general property which may belong to the party making the will, such a will shall not be deemed an execution of the power with regard to any specific property." And in *Lempriere v. Valpy*, 5 Sim. 108, 121, the same learned Judge says: "It cannot be assumed on principle, that the will of a feme covert is, of necessity, altogether inoperative as a will. And no case has been quoted, nor, at the hearing, did I recollect any, nor have I since been able to find any, in which it has been held that the will of a feme covert, professing to give all her property, in general terms, must be taken to be an execution of mere powers which she may possess. If any such case had existed, the counsel for the plaintiff,^(a) whose able Treatise on the Doctrine of Powers is so well

(a) Sir Edward Sugden.

*949] known to the profession, would have named it." *It is possible here that the testatrix may have had other property upon which the will could operate: she might have savings. [MAULE, J. Or, she may have *intended* to save,—which is the more probable conjecture, seeing the amount of her annuity!] If she had none, that fact ought to have appeared on the plaintiff's case.

W. Bigg, in reply. As to the first point, the case comes completely within the decision of the House of Lords, in *Burdett v. Doe d. Spilsbury*. Signing, or sealing, and delivering a will in the presence of a third person, is a *publication*. This instrument purports to be Mrs. Johns's last will and testament: the mere fact, therefore, of her signing it in the presence of two witnesses, was a publication, and consequently the will was a valid exercise of the power.

As to the second point,—*Nannock v. Horton*, *Jones v. Tucker*, *Jones v. Curry*, and *Webb v. Honnor*, were all cases of the execution of powers by persons not being under any disability. The only cases upon the subject that have any application, are *Churchill v. Dibben*, *Curteis v. Kenrick*, *Lovell v. Knight*, and *Lempriere v. Valpy*. Consistently with the two former, the court will, it is submitted, hold that this will is a sufficient compliance with the terms of the power.

The following certificate was afterwards sent to the Vice-Chancellor:—

"This case has been argued before us by counsel: we have considered it, and are of opinion that the document or instrument in question, was not a due execution of the power in question.

"W. H. MAULE.

"C. CRESSWELL.

"E. V. WILLIAMS."

*950] *IN THE HOUSE OF LORDS.

BENSON v. CHAPMAN. Dec. 4.

The ship *Lord Cochrane*, with a cargo on board, left Pernambuco, on a voyage to Liverpool, on the 29th of June, 1839: in proceeding out of the harbour at Pernambuco, she struck on a rock, and was obliged to put back to be repaired: the master, after several surveys, and with the concurrence of the persons to whom he had been addressed by the owner to procure a cargo, proceeded to repair the ship, the repairs continuing from the 29th of June, 1839, till the 4th of January following: the expenses of the repairs amounted to 7132*l.* 3*s.* 8*d.*, a sum much exceeding the value of the ship and freight, and which sum the master, not being able to procure it in any other manner, was compelled to borrow on bottomry, and accordingly executed a bottomry-bond, charging the ship, freight, and cargo: the cargo, which had been necessarily taken out during the repairs, was reshipped, and the ship sailed on the 6th of January, 1840, and arrived with the cargo at Liverpool: the obligees of the bottomry-bond received the freight, under a decree of the court of Admiralty. It did not appear when the owner was first informed of the accident to the ship; but it appeared that a letter from Pernambuco, dated the 14th of November, 1839, and received on the 30th of December, containing an intimation that "the *Lord Cochrane's* expenses were likely to exceed 5000*l.*, with commission, discharging and reloading cargo, &c.," was shown to him, and that, on the same day, he gave notice of abandon-

ment of the ship and freight to the respective underwriters on each, and did not interfere in any way afterwards in respect of either ship or freight.

In an action against the underwriters on freight, claiming for a total loss, by a special verdict, setting out the above facts, the jury found that the plaintiff had acted *bond fide*, without laches and as a prudent owner of the ship and freight, if uninsured, would have acted:—

Held,—affirming the judgment of the Exchequer Chamber,—that the plaintiff was not entitled to recover in respect either of a total or of a partial loss of freight,—the freight having actually been earned, and its receipt by the obligee of the bottomry-bond being, in law, a receipt by the plaintiff.

Held also, that it is the duty of the master, in case of damage to the ship, to do all that can be done towards bringing the adventure to a successful termination,—to repair the ship, if there be a reasonable prospect of doing so at an expense not ruinous,—and to bring home the cargo, and earn the freight, if possible; that, in the absence of any finding to the contrary, it must be assumed that this duty has been properly performed; that, where the master elects to repair, the mere fact of the expenses of repair ultimately proving to be greater than the value of the ship, would not be sufficient to show that he acted beyond the scope of his authority, or to entitle the owner to treat him as ceasing to be his agent, as soon as he commenced the repairs; and that, as the special verdict did not find that the owner, if on the spot, would not have repaired the ship, the court could not infer that he would not have done so.

A partial loss of freight may be recovered upon a declaration alleging a total loss.

COVENANT. Benson (the plaintiff below, as well as plaintiff in error) declared on a policy of insurance, dated the 12th of July, 1839, made by the defendant *as chairman of The Neptune-Marine-Insurance Company, of London, in relation to the ship Lord Cochrane, at [951 and from Pernambuco to Liverpool, “on freight valued at 2000*l*.” The declaration further alleged, that, on the 12th of July, 1839, certain goods were loaded on board the Lord Cochrane at Pernambuco, and that the ship proceeded therewith on her voyage; and that the plaintiff and one William J. C. Benson were interested in the subject-matter of assurance; that the ship, with the said goods on board thereof, departed and set sail from Pernambuco aforesaid, and that during the continuance of the risks in the policy mentioned, and whilst the ship was proceeding on her said voyage, with the said goods so on board of her as aforesaid, and whilst she was leaving the harbour of Pernambuco aforesaid, to wit, on, &c., the ship struck and was driven, by the perils and dangers of the seas, and the violence of the winds and waves, against and upon a certain bank and reef off the said harbour there, and thereby then became and was bulged, strained, broken, damaged, spoiled, and destroyed, and was thereby *wholly disabled* from proceeding on her said voyage, and *became and was wholly lost*; that by means thereof *the said freight became and was wholly lost to the plaintiff*; that of all the premises as well the defendant as the said company, had due notice, to wit, on the day aforesaid; that the plaintiff thereupon then requested the defendant to pay to him the plaintiff the said sum of 2000*l*. so insured by him as aforesaid, and which he the defendant, by reason of the premises, *and according to the custom of merchants, then ought to have paid to [952 the plaintiff, according to the tenor and effect of the said policy of insurance; and that, at the time of the making of the said policy of insurance, and also at the time of the accruing of the cause of action in that count mentioned, to wit, on, &c., the amount of the individual share of

him the defendant in the capital stock of the said company exceeded 2000*l.*; yet that the defendant did not then pay, nor had he at any time thereafter paid, the said sum of 2000*l.*, or any part thereof, to the plaintiff, but had wholly neglected and refused so to do, &c.

The defendant pleaded,—first, that the plaintiff and the said William J. C. Benson were not, nor was either of them, interested in the said premises in the said policy of insurance mentioned, *modo et formd.*,—secondly, that the said ship was not, during the continuance of the risks in the said policy mentioned, wholly lost, *modo et formd.*,—thirdly, that the said freight in the declaration mentioned, did not become wholly lost, *modo et formd.*,—fourthly, that the said loss in the declaration mentioned did not, nor did any part thereof, take place, nor was the same occasioned, by the adventures and perils which the said company were contented to bear, and did take upon them, in that voyage, *modo et formd.*,—fifthly, traverse of the abandonment alleged in the declaration,—sixthly, a set-off of 4000*l.* for money had and received.

The plaintiff joined issue on the first five pleas, and to the last replied that he was not nor is indebted, *modo et formd.* Issue thereon.

At the trial, before ERSKINE, J., at the sittings in London after Trinity term, 1842, a verdict was, by consent, found for the plaintiff, subject to the opinion of the Court of Common Pleas upon a special case, *953] with liberty to either party to turn it into a special verdict,—*it being agreed, that, upon the argument of the special case, the court should be at liberty to draw all inferences which in their opinion ought to have been drawn by the jury; and that, if the case should afterwards be turned into a special verdict, those inferences should be stated therein as facts found by the jury.

The special case was argued in Michaelmas term, 1843: and the judgment of the court was delivered by TINDAL, C. J., on the 6th of December, in that year,—the court holding that, under the circumstances disclosed, the plaintiff was entitled to recover, as for a total loss, against the underwriters on freight.^(a)

By the special verdict,—which was ultimately settled by MAULE, J.,—it was found,

As to the first issue,—that the plaintiff and W. J. C. Chapman were interested in the premises in the said policy of insurance mentioned, in manner and form as the plaintiff had in his declaration in that behalf alleged.

As to the second issue,—that the said ship was, during the continuance of the risks in the policy mentioned, wholly lost, in manner and form as the plaintiff had in his declaration alleged.

As to the fifth issue,—that the freight so insured against by the plaintiff was abandoned, in manner and form as the plaintiff had in his declaration alleged.

(a) See *Benson v. Chapman*, 6 M. & G. 792, 7 Scott, N. R. 625.

As to the sixth issue,—that the plaintiff was not indebted to the defendant, in manner and form as the defendant had in his last plea alleged.

As to the third issue,—that, after the commencement, and during the continuance of the risk insured against by the policy in the declaration mentioned, the ship in question being at Pernambuco in the Brazils, *received goods on board, on freight for Liverpool, in June, [*954 1889; the amount of the freight of which goods was 2200*l.*, in which goods the plaintiff and the other owner of the ship were interested, as in the declaration mentioned: That the ship, being thus laden, sailed from Pernambuco for Liverpool, on the voyage insured against, on the 29th of June, 1889: That, while proceeding out of the harbour at Pernambuco, she, by perils of the sea, struck on a rock and a bank; the damage produced by which rendered it necessary for her to put back to Pernambuco for repair: That she *was* so put back to Pernambuco for repair; but there being no dry-dock there, nor any other means of examining the ship, to ascertain the nature and extent of the injury, with a view to the requisite repairs, except by heaving down, it became necessary to take out the cargo, and heave the ship down, in order to make that examination: That the said cargo was taken out, and the ship thereupon hove down accordingly; whereupon, several surveys were necessarily made; and, subsequently, the master of the said ship, in concurrence with the firm of M'Calmont & Co., of Pernambuco (to whom, on going out from England, he had been directed to apply for cargo), proceeded to cause such ship to be repaired: That she was under repair from the 29th of June, 1889, to the 4th of January, 1840: That Pernambuco is a place very inconvenient and expensive for the repair of ships: That *the repairs so done, the cost of which amounted to 7132*l.* 3*s.* 8*d.*,—a sum exceeding the value of the ship and freight,—were necessary, by reason of the damage aforesaid, in order to make the ship navigable, and in a condition to proceed on her voyage*: That, to discharge this sum, every reasonable effort was made, at Pernambuco, to obtain money from various persons on loan, by bottomry, and otherwise: That no money could be obtained, on any terms, until M'Calmont & Co. consented to *advance 7132*l.* 3*s.* 8*d.* on bottomry, at 20 *per cent.* premium; [*955 and, accordingly, the master of the ship, on the 6th of January, 1840, at Pernambuco, executed a certain instrument in writing, commonly called a bottomry-bond, to M'Calmont & Co., pledging to them the said ship, freight, and cargo, for that sum and bottomry premium at 20 *per cent.*: That, on the 30th of December, 1838, the plaintiff was shown a letter from M'Calmont & Co. to their agents in London, which had been received, and was as follows:—

“Pernambuco, 14th November, 1839.

“The Lord Cochrane's expenses are likely to exceed 5000*l.*, with commissions, discharging and reloading cargo, &c., &c.”

That thereupon the plaintiff, on the same day, gave the following notice to the defendant, and to the underwriters on the ship, which the plaintiff had insured with the several insurance offices described in the notice :—

“London, 30 December, 1839.

“My ship, the Lord Cochrane, being insured as follows :—ship, 3000*l*. with The Indemnity-Marine-Insurance Company, 700*l*. with The Dundee-Marine-Insurance Company, 800*l*. with The Dundee-Sea-Insurance Company,—freight, 2000*l*. with The Neptune-Insurance Company; and having sustained damage since she sailed with her cargo from Pernambuco; and I having received information that the expenses incurred in relation to the accident, will exceed the value of the ship and freight, and that the amount will be secured by bottomry, and that the repairs will still be incomplete; I do hereby abandon the said ship and freight to the said respective insurers, according to their respective rights under the circumstances. I have further to acquaint the underwriters, that I am *956] informed that a bill will be drawn *upon me for the amount, which will exceed 5000*l*., by the payment of which the bottomry premium may be avoided; and that I shall not accept such bill on my own account, but shall be ready to pay same for their account, upon their putting me in funds for that purpose. (Signed) “THOMAS BENSON.”

“W. Ellis, Esq., Indemnity-Mutual-Marine-Insurance Company, Broad Street, underwriters on the ship, for 8000*l*.

“A. Crichton, Esq., Dundee-Sea-Insurance Company, Dundee, ditto, for 800*l*.

“The Manager of The Dundee-Marine-Insurance Company, Dundee, ditto, for 700*l*.

“James Mackie, Esq., Neptune-Marine-Insurance Company, 39 Old Broad Street, underwriters on freight for 2000*l*,” being the company, as a member of which the defendant is sued on the policy in question :

That the plaintiff did not interfere in any way afterwards, in respect of either ship or freight; nor had he ever received any part thereof, or any satisfaction or benefit on account thereof: That the ship, having received the cargo again on board,—in respect of the reloading of which certain expenses included in the 7132*l*. 3*s*. 8*d*. were necessarily incurred,—sailed again from Pernambuco on the 6th of January, 1840, and arrived, with the whole of the original cargo (which was of the value of 19,189*l*.) on board, at Liverpool, on the 19th of March, 1840: That, upon the arrival of the said ship, proceedings to enforce payment were taken by the obligees of the bottomry-bond, in the court of Admiralty; under the order of which court the ship was sold for 1675*l*., and the freight collected from the consignees of the goods; and the amount of *957] both, under an order of that court, was paid to the obligees of the *bottomry-bond: That, according to the practice and course of business between assured and underwriters in London, in a case of *ave-*

rage loss, the amount of the proportion of the 7182*l.* 8*s.* 8*d.*, and of the bottomry premium, which ought to be borne on account of the freight, was, 569*l.* 11*s.* 3*d.*: *That, in respect of all the aforesaid premises, the plaintiff and the several other parties acted bonâ fide, and the plaintiff acted without laches, and as a prudent owner of ship and freight, if uninsured, would act :*

But, whether or not, upon the whole matter aforesaid, by the jurors aforesaid in form aforesaid found, the said freight in the declaration mentioned, did or did not become wholly lost in manner and form as the plaintiff hath in his said declaration alleged, the jurors aforesaid are altogether ignorant ; and thereupon they pray the advice of the justices of the court of our Lady the Queen of the Bench at Westminster : And if, upon the whole matter aforesaid, it shall seem to the said court that the said freight in the declaration mentioned, became wholly lost, in manner and form as in the declaration is alleged, then the jurors, &c., say that the said freight in the declaration mentioned became wholly lost, in manner and form as in the declaration is alleged : But, if, upon the whole matter aforesaid, it shall seem to the said court that the said freight did not become wholly lost, in manner and form as in the declaration in that behalf alleged, then the jurors, &c., say that the said freight did not become wholly lost as aforesaid : And, if the justices of the said court shall be of opinion, upon a consideration of the premises, that, by reason thereof, the said freight became partially lost to the plaintiff, but not wholly lost, and that the plaintiff, by reason of the premises, is entitled to recover against the defendant for an average loss, the jurors, &c., find that the said freight became lost to the plaintiff, in manner and form *as the plaintiff has alleged in his declaration ; and in that [958 case they assess the damages of the plaintiff on occasion of the breach of covenant in the declaration mentioned, besides his costs and charges by him about his suit in that behalf expended, to 569*l.* 11*s.* 3*d.*, and, for those costs and charges, to 40*s.* And because, &c.

As to the fourth issue within joined, the jurors, &c., find, upon and in relation thereto, the said several matters particularly mentioned, and hereinbefore set forth, as found by them upon and in relation to the third issue joined between them the said parties : But, whether or not, upon the whole matter aforesaid, by the jurors aforesaid in form aforesaid found, the said loss of the said freight in the declaration mentioned was occasioned by the adventures and perils which the said company were contented to bear, and did take upon them in that voyage, as the plaintiff hath in his said declaration in that behalf alleged, the jurors aforesaid are wholly ignorant, &c. : And if, upon the whole matter aforesaid, it shall seem to the said court that such loss of the said freight was occasioned by the adventures and perils which the said company were contented to bear, and did take upon them in that voyage, as the plaintiff hath in his said declaration in that behalf alleged, then the jurors, &c.,

say that the said loss of the said freight was occasioned by the adventures and perils which the said company were contented to bear, and did take upon them in that voyage, as the plaintiff had above in his said declaration in that behalf alleged: But, if, upon the whole matter aforesaid, the contrary shall appear to the said court, then the jurors, &c., say that the said loss was not occasioned by the adventures and perils which the said company were contented to bear, and did take upon them in that voyage:

And, if it shall appear to the said court of our said Lady the Queen *959] of the Bench, that the verdict ought *to be entered for the plaintiff on the said several issues, for a total loss, then the jurors, &c., assess the damages of the said Thomas Benson, on occasion of the breach of covenant in the declaration mentioned, besides his costs and charges by him about his suit in that behalf expended, to 2395*l.* 4*s.* 2*d.*, and, for those costs and charges, to 40*s.*

The judgment was formally entered on the 28th of February, 1845,—as to the third issue, “that the said freight in the declaration mentioned became wholly lost, in manner and form as in the said declaration is alleged,”—and, as to the fourth issue, “that the said loss of the said freight in the said declaration mentioned, was occasioned by the adventures and perils which the said company were contented to bear, and did take upon them in that voyage, as the plaintiff had in his said declaration in that behalf alleged.”

A writ of error was afterwards brought, upon which the common errors were assigned.

The case was argued in Michaelmas Vacation, 1845, before POLLOCK, C. B., PARKE, B., ALDERSON, B., PATTESON, J., COLERIDGE, J., ROLFE, B., WILLIAMS, J., and WIGHTMAN, J.

The Court of Exchequer Chamber reversed the judgment of the Court of Common Pleas on the third and fourth issues, holding that the adventure was not, in point of fact, abandoned, and that, as it was not found, it could not be inferred, that a prudent owner, if uninsured, would not have repaired, and therefore that the underwriters on freight were not liable as for a total loss; and, further, that the court was not at liberty to refer to the finding of the jury upon another issue,—viz. that the ship was wholly lost,—and to take that fact as found, in deciding whether the freight was wholly lost, and lost by a peril insured against.

The plaintiff below thereupon brought a writ of error returnable in parliament.

*The case was argued on the 3d and 4th of July, 1848, the *960] judges present being, ALDERSON, B., PATTESON, J., COLERIDGE, J., COLTMAN, J., MAULE, J., WIGHTMAN, J., CRESSWELL, J., ERLE, J., and V. WILLIAMS, J., and the arguments differing little from those already urged in the courts below.

Sir *F. Thesiger* and *Peacock* (with whom was *Barstow*), for the plaintiff in error, cited the following authorities:—*Roux v. Salvador*, 1 N. C.

526, 3 N. C. 266, 1 Scott, 491, 4 Scott, 1, M'Carthy v. Abel, 5 East, 388, Sharp v. Gladstone, 7 East, 24, Case v. Davidson, 5 M. & Selw. 79 (in error), 2 Brod. & Bingh. 379, 5 J. B. Moore, 116, Cambridge v. Anderton, 2 B. & C. 691, 4 D. & R. 203, 1 Carr. & P. 213, Ryan & Moody, 60, Allen v. Sugrue, 8 B. & C. 561, 3 M. & R. 9, Young v. Turing, 2 M. & G. 593, 2 Scott, N. R. 752, Mellish v. Andrews, 15 East, 13, Idle v. The Royal-Exchange-Assurance Company, 8 Taunt. 755, 778, 3 J. B. Moore, 115, 151, Gardner v. Salvador, 1 M. & Rob. 116, Fleming v. Smith, 1 House of Lords Cas. 513, Webster v. Seekamp, 4 B. & Ald. 352, Cary v. White, 1 Bro. P. C. 284 (first edit. 1784), 5 Bro. P. C. 325 (second edit. 1803), The Case of The Alexander, 6 Jurist, 241, Green v. The Royal-Exchange-Assurance Company, 6 Taunt. 68, The General-Interest-Insurance Company v. Ruggles, 12 Wheaton's Rep. 408, 413, Read v. Bonham, 3 Brod. & Bingh. 147, 6 J. B. Moore, 397, Doyle v. Dallas, 1 M. & Rob. 48, Hunter v. Parker, 7 M. & W. 322, Holdsworth v. Wise, 7 B. & C. 794, 1 M. & R. 673, Abbott on Shipping, 8th edit., by Shee, Serjt., 135, and Park on Insurance, page 600.(a)

*Sir *F. Kelly* and *Martin* (with whom was for the defendant in error), cited *Anderson v. The Royal-Exchange-Insurance Com-* [*961
pany, 7 East, 38, *Holdsworth v. Wise*, *M'Carthy v. Abel*, *Everth v. Smith*, 2 M. & Selw. 278, *Falkner v. Ritchie*, 2 M. & Selw. 290, *Idle v. The Royal-Exchange-Assurance Company*, and the *Case of The Gratitude*, 3 Rob. Adm. Rep. 240.

Peacock, in reply, referred to *Idle v. The Royal-Exchange-Assurance Company*, *Buxton v. Snee*, 1 Ves. jun. 155, *Milles v. Fletcher*, 1 Dougl. 231, *The Case of The Gratitude*, *Fleming v. Smith*, *The Case of The Constantia*, 2 Rob. Adm. Cas., temp. Lushington, 404, *Johnson v. Shepper*, 1 Salk. 35, *Young v. Turing*, and *Irving v. Manning*, 1 House of Lords Cas. 287, 1 Man. Gr. & S. 168.

Lord BROUGHAM proposed that the following questions should be put to the judges,—First, “Whether, on the facts stated on the special verdict, the plaintiff is entitled to recover for a total loss of the freight?” Secondly, “Whether, upon the pleadings and the facts stated in the special verdict, the plaintiff is entitled to recover for a partial loss of the freight?” And, thirdly, “Whether the findings of the jury do not entitle the plaintiff to a verdict for 569*l.*, as for a partial loss?” His Lordship added that it might, in the result, be the opinion of the judges that either there had been a total loss, or none at all; but that it would be better that both the questions, as to total and as to partial loss, should be considered by the judges.

The judges who were present at the argument desired time to consider what answers they should give *to these questions; and on the 9th of July, 1849, their unanimous opinion was delivered by [*962

(a) Citing *Gardiner v. Croasdale*, 2 Burr. 904, 1 W. Bl. 198, *White v. Bodinam*, 2 Salk. 629, 1 Wms. Saund. 312 a.

ALDERSON, B. The first question put by your lordships to the judges, is,—“Whether, upon the facts stated in the special verdict, the plaintiff was entitled to recover for a total loss of the freight.”

We are all of opinion that he was not.

The special verdict states, that the ship, with her cargo, left Pernambuco, on her voyage to Liverpool, on the 29th of June, 1839; that, in proceeding out of the harbour, she struck on a rock, and was obliged to put back to repair; that the master, after several surveys, and with the concurrence of the persons to whom he had been addressed by the plaintiff to procure a cargo, proceeded to repair her; that she was under repair from the 29th of June to the 4th of January following; that the expenses of those repairs amounted to the sum of 7182*l.* 3*s.* 8*d.*, much exceeding the value of the ship and freight, which sum the master, not being able to procure it in any other manner, was compelled to borrow on bottomry, and executed a bottomry-bond, charging the ship, freight, and cargo; that the cargo had been necessarily taken out during the repairs, but was re-shipped; that the ship sailed on the 6th of January, 1840, and arrived with the cargo at Liverpool; and that the obligees of the bond received the freight, under a decree of the Court of Admiralty.

The freight, therefore, having been earned, it is plain that the plaintiff cannot recover for a total loss of that freight, unless he can repudiate all that was done by the master, and treat the ship and freight as wholly lost at Pernambuco on the 29th of June.

The special verdict does not state *when* the plaintiff was first informed of the accident to the ship. The only information to the plaintiff which it notices, is, that *conveyed by a letter from Pernambuco, dated *963] the 14th of November, 1839, which was received on the 30th of December, in that year, and contains this passage,—“The Lord Cochrane’s expenses are likely to exceed 5000*l.*, with commission, discharging and reloading cargo, &c.” On the same day, the plaintiff gave notice of abandonment of the ship and freight to the respective underwriters on each, and did not interfere in any way afterwards, in respect of either ship or freight.

It is, undoubtedly, a rule, that the facts are to be taken as stated in a special verdict, and that inferences of fact are not to be drawn by the court: but it is material to observe that this special verdict does not state that the plaintiff abandoned when he first heard of the accident, or even when he first knew that the ship was under repair, nor that, in common prudence, he would not, if he had himself been at Pernambuco, and uninsured, have done precisely what the master did.

The duty of the master, in case of damage to the ship, is, to do all that can be done towards bringing the adventure to a successful termination; to repair the ship, if there be a reasonable prospect of doing so at an expense not ruinous; and to bring home the cargo, and earn the freight, if possible.

In the absence of any finding to the contrary, we must assume that this

duty was properly performed: and it may well have been so; for, consistently with all the facts found in the special verdict, the expenses, in the course of repairing, may have been discovered to be much greater than was at first contemplated, without any fault in the master, or those under whose advice he acted. Subsequent events may show that he acted erroneously; but we think it impossible to say that he acted beyond the scope of his authority, or that the plaintiff is entitled to treat him as being no longer his agent, so soon as he commenced the repairs, and to *consider the ship as a new ship, or the adventure in the voyage home as a new adventure, as he might have done if the master [964 had, as perhaps the facts might have justified him in doing, abandoned the adventure, and sold the ship. The election to repair was made, and the repairs commenced, in July, 1839: and the facts found by the special verdict are not sufficient to show that the master, in making that election, acted beyond the scope of his authority; for, he certainly had authority to act as a prudent uninsured owner would have done; and it is not found that an owner so situated would have acted differently.

Under these circumstances, the plaintiff was, we think, bound by the election of the master, and could not, in the month of December following, when he heard of the great amount of the expenses, get rid of that election, and put himself in the same situation as if no repairs had been done. The abandonment can have no effect under such circumstances. If the loss, being a loss by damage to the ship, was total in the first instance, no abandonment was necessary: if it was not, abandonment could not, even at the first, make it so; much less, after the plaintiff, by his agent, had elected to repair, and after the repairs had been nearly completed.

In cases of capture or detention, where the loss is apparently total, abandonment to the underwriters on freight may be very important: but, even in such cases, if the ship be re-taken or released, and freight be earned before action brought, the owner cannot recover on the policy on freight; nor, indeed, is there any instance to be found, in which an action for a total loss of freight has been held to be maintainable, where the freight has been actually earned.

We have no doubt that the receipt of the freight by the obligee of the bond, was, in law, a receipt by the *plaintiff,—having already expressed our opinion that he was bound by the election of the master to repair, and of course bound by the bottomry-bond which became necessary: and, even if it were not a receipt by the plaintiff, still he would not have been prevented from receiving the freight by the perils insured against, but by his own act in pledging the freight by the bottomry-bond; and he might have obtained the freight, if he had chosen to pay off that bond. The freight was not actually lost by the perils insured against; for it was, in point of fact, actually earned; nor can it

be said to be lost to the plaintiff by those perils; but, if lost to him at all, it has been lost by his own acts and omissions.

We say nothing as to the finding of the jury on the issue as to the total loss of the ship; because your lordships' question is confined to the effect of the special verdict, which is found only on the third or fourth issues, and cannot be altered or construed by the finding on the other issues.

To the second question put by your lordships,—“Whether, upon the pleadings and the facts stated in the special verdict, the plaintiff was entitled to recover for a partial loss,”—we answer in the negative. The pleadings, indeed, present no obstacle; for, if a partial loss of freight can be recovered at all, we know no reason why it may not be recovered on a declaration claiming a total loss, as is constantly the case in actions on policies on the ship. But, if any freight was earned, the whole freight was earned; and we have already expressed our opinion that freight *was* earned. The whole original cargo was re-shipped and brought home.

To the third question put by your lordships, we answer that the findings of the jury do not entitle the plaintiff to a verdict for 569*l.*, as for a partial loss; and the findings on the other issues do not in any respect *touch this question. As to the sum of 569*l.*, which is alleged to *966] be the proportion of the expenses at Pernambuco which the freight ought to bear, a question might have arisen, if the underwriters on freight had accepted the abandonment, and paid the total loss claimed; for, then, the freight having afterwards been received, if the underwriters had claimed it as money had and received to their use, and could have supported that claim, an attempt might have been made to deduct the 569*l.* as salvage of the freight: but no such question arises in this action, in which the sum insured is claimed as lost freight, not as money paid by way of average or salvage, or in any other manner than as by loss of freight. The underwriters upon this policy engage only that freight shall be earned, and it *has* been earned. At all events, if, by the terms of the policy, any other contract can be considered to be entered into, the declaration in this case is not adapted to such contract, or to anything but loss of freight.

On a subsequent day, Lord BROUGHAM said: In this case the learned judges have given an unanimous opinion; and I entertain no doubt whatever upon the question. I therefore, move your lordships that judgment be given for the defendant in error.

Lord CAMPBELL. This case does not, I think, admit of any reasonable doubt. There is neither a partial nor a total loss of freight, because the goods, the freight of which was insured, were loaded at the port of outfit, and were delivered at the port of destination, and the freight was paid. It is true, the freight was not received by the owner of the ship; but it was received under his authority: and, unless you are altogether to dis-

card what the master had done, or to suppose that he had acted fraudulently, or without authority, there can be no doubt that the judgment should be for the *defendant in error. I therefore entirely con- [967
cur in the motion of my noble and learned friend.

Judgment for the defendant in error, with costs.

Note—A.*

Mr. Justice BLACKSTONE (1 Bla. Comm. 273) has said: "The affairs of commerce are regulated by a law of their own, called the law-merchant, or *lex mercatoria*, which all nations agree in, and take notice of; and, in particular, it is held to be part of the law of England, which decides the causes of merchants by the general rules which obtain in all commercial countries; and that often even in matters relating to domestic trade, as, for instance, with regard to the drawing, the acceptance, and the transfer of inland bills of exchange." Here, the law appears to be correctly, as well as clearly laid down, though the authorities referred to by the learned commentator may not have been well selected.

This *lex mercatoria* being adopted into, and made part of, the common law of England, its provisions are binding upon all the inhabitants of countries governed by that law. Thus, it being part of the law-merchant, that a bill of exchange payable to order, may be endorsed *ad infinitum*, if A., the drawer of a bill payable to the order of B., were to direct, upon the face of the bill or otherwise, that the bill should not be endorsed to more than three successive endorsees, the restriction would be void,—as much so as if an act of parliament had expressly declared that a bill drawn payable to order should be transferable indefinitely by endorsement notwithstanding the insertion of such a restriction. The presumption that parties in such commercial transactions mean to deal according to the *lex mercatoria*, is not a mere presumption of fact, but is a *presumptio juris et de jure*, against which no averment and no proof can be received. Where, therefore, the judges have entertained doubts upon a point of mercantile law, they have consulted merchants upon the mercantile usage,—not as a matter of fact from which inferences are to be drawn, but as a matter of law, with which the merchants called were conversant, in which they were experts.† Thus in *Pickering v. Barkley*, 2 Roll. Abr. 248. pl. 10,‡ merchants "were heard in court," on a point of mercantile law raised on *demurrer*; and, though it afterwards became more usual to take the opinions of merchants *at nisi prius*, yet the opinions so delivered are to be regarded as *responsa prudentum*, given to assist the judge in laying down [968
the law to the jury.

Where a commercial contract is entered into between persons carrying on business within a certain district, upon its being shown, that, in the particular trade, as it is uniformly carried on in that district, a particular usage has obtained, the parties will be presumed to have contracted upon the footing of such usage until the contrary appears. It is an inference which a jury will unavoidably draw, but it is simply an inference of fact,—which must be drawn by the jury, and cannot be supplied by the court. Where the same usage has been frequently proved, the courts have said that they will take judicial notice of such usage, and will not require it to be proved in each case that arises. Still the effect of the special usage will be the same, whether it is proved in the particular case, or is imported into the particular case by a judicial recollection of the evidence given in similar cases before. In whatever way the fact of the usage may be established, it is for the jury to draw the inference that the contract before them was entered into with reference to that usage.

In the case of *Brandão v. Barnett*, 3 Man. Gr. & S. 519, 12 Cl. & Fin. 737, the special verdict is silent as to any usage giving to London bankers a general lien. But, inasmuch as such a usage has been often proved, judicial notice would be taken of its existence. This judicial notice would be tantamount to an express finding by the jury, that such a usage existed. But, the existence of the usage being assumed, the inference that the parties contracted with reference to the usage, is an inference of fact, open to be rebutted by proof that the parties, in contracting, expressly

* Accidentally omitted to be inserted in a former volume. See 3 Man. Gr. & S. p. 530, n.

† *Ant.*, p. 825, 826.

‡ M. 24 Car. I. B. R. Translated, 16 Vin. Abr. 203, pl. 10.

derogated from the usage. What power has the court to draw an inference of fact,—an inference which does not necessarily result from the premises,—an inference which may be more or less cogent, according to the surrounding circumstances?

A merchant at Cadix drawing a bill upon Amsterdam, or a merchant at Archangel drawing a bill upon Lisbon, is bound by the law-merchant, and cannot annex to his bill any stipulation which that law disallows. But neither drawer nor drawee, nor the commercial tribunals of their respective countries, would, it is conceived, take notice of local usages in particular trades,—as, of a usage in a certain country market for butterdealers to vend their commodity by the yard, or of a usage in London for bankers to hold the negotiable securities of their customers subject to a general lien,—although the existence of such usages having been proved *usque at nauseam*, judges may have been induced to relieve suitors, juries and themselves, from the necessity of again going over the same ground, by taking *judicial* notice of the often-proved customs, and although every court in England should have declared that the effect of such judicial recognition had been, in each case, to engraft the local usage upon, and to cause it to form part and parcel of, the general law-merchant.

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2. A. owned and occupied freehold land in the parish of B. of more than the clear yearly value of 40s., and also occupied, as tenant, a house of less than the clear yearly value of 10l., in the parish of C., at a distance from the land,—both house and land being within

the borough of D. and, if added together, being of value sufficient to form a borough qualification:—Held, that A. was entitled to be registered for the county, in respect of the land, but not for the borough. *Burton, app., The Overseers of Aston, resp.* 7

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AN
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AGREEMENT.

Construction of.

1. *Series of Letters.*—A., a merchant at Dublin, contracted, through the agency of C. & F., merchants at Liverpool, to purchase of B., a ship-builder at Quebec, a vessel, described in the contract as then building,—B. engaging that she should be finished "in a complete and workmanlike manner, and furnished with the certificate to that effect from Lloyds' surveyor;" and A. agreeing to pay the stipu-

lated price by his acceptance of B.'s draft at six months after date from the day the vessel should be ready to take in cargo: and the agreement contained the following clause,—
"In case of the ship not being according to B.'s representation and the within agreement, and should, on her arrival at Dublin, exhibit any defect which shall be declared as such by any two competent persons, B. hereby agrees to put it to rights, at his own expense, on her second voyage." The vessel being finished, notice of that fact was sent to A., and on the 14th of June, 1845, a draft for the price was forwarded to him through D., for his acceptance. On the 17th A. wrote to D. as follows:—"From the course adopted by B. we shall have some difficulty, unless you take the position which C. & F. stood in to me, viz. to guaranty that B. will fulfil the contract to the full extent and meaning as it was so understood at our agreement, which he has not done in two essential points, &c. Immediately on hearing from my agent in Quebec, I wrote to C. & F., who replied that they would be responsible as agreed on. The course taken by B. is, to avoid this, and, by getting me to accept the bill sent through your hands, would leave me no remedy but to go to law. I only require the guarantee from you that B. will perform his contract and the representations he made of the vessel. With regard to the survey which must be had,—if you agree to appoint one merchant, I will appoint the other: let them agree to an umpire. Give me a letter of guarantee that B. will abide by the award, and that he will perform his part without delay." To this letter,

D. replied,—“We are perfectly willing to take the position in which you propose (quite reasonably) to place us. If, therefore, you accept B.'s bill, and return it to us forthwith, we hereby agree to become personally responsible to you for the due fulfilment of the conditions of B.'s contract: and, as C. & F. have the confidence of all parties, we suggest that they should be appointed to decide what ought to be done, in case, upon the ship's arrival, you have any cause of complaint.” Upon receipt of D.'s letter, A. accepted the bill, and paid it at maturity. On the ship's arrival at Dublin, A. wrote to D., informing him that he had appointed Brooke to survey her on his behalf: to this D. replied,—“As your contract was made through C. & F., we leave them to adjust all differences, and we will be responsible for whatever they award.” C. & F. appointed Pope to survey the vessel with Brooke. These two, having surveyed the vessel, reported that 351*l.* (exclusive of 25*l.*, their fees and expenses) was required to complete her according to contract; whereupon C. & F. made their award as follows:—“We, the undersigned, having been authorized by D., of London, to estimate the sum which A., of Dublin, is entitled to receive from B., of Quebec, for the deficient state in which he turned out the ship J. F., contrary to the terms of his contract, and not feeling ourselves competent for such a task,—that is, the estimating in a tradesmanlike manner such deficiencies,—did for that purpose appoint W. Pope to meet J. W. Brooke, they two to decide on the deficiencies of the said vessel, and to estimate an equivalent in money for the said deficiencies; and, those gentlemen having, after due examination, and by written certificate, declared that sum to be 351*l.*, and surveyors' fees 25*l.*; we hereby award that the said sums (together 376*l.*) be paid to A. by D., on behalf of B., with interest,” &c. :—Held, upon a special case setting out the above facts and correspondence, that there was no evidence that A. had ever acquiesced in the proposal of reference to C. & F., or that the latter ever professed to act under any authority derived from A.; and, consequently, that A. was not entitled to recover against D. the sum mentioned in the so-called award. *Fagan v. Harrison.* 388

2. *Condition precedent.*]—By agreement between the plaintiffs, trustees of a marriage-settlement, and the defendants, three of the committee of management of a projected railway company,—reciting that a bill for the formation of the railway was pending in the House of Commons, and that the railway was intended to pass through a certain park which

was subject to the settlement,—it was agreed, that, if the bill should pass into a law in the then present or the next session, the company should, within six calendar months after the passing of the bill, and before commencing the railway on any part of the said park and hereditaments, pay the plaintiffs 11,700*l.*; and that, in consideration of that sum, the company should have conveyed to them nineteen acres of the said land, &c.,—the whole of the said agreement to be null and void, unless sanctioned by the Court of Chancery in a cause of *Lawrence v. Porcher*, and so much of that agreement as the court should require should be inserted in the act :—Held, that the plaintiffs' obtaining the sanction of the court to the agreement within six months of the passing of the bill, was a condition precedent to their right to sue the defendants for the money. *Porcher v. Gardner.* 461

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Teste of—See OUTLAWRY.

AMBIGUITY.

See EVIDENCE, II.

ANNUITY.

Consideration for.

The reputed father of an illegitimate child, upon ceasing to cohabit with the mother, wrote to her as follows:—“As I always promised that you and your child should never want, I will allow you 100*l.* a year for your life and little Emma's, to begin from the 1st of July, and to be paid quarterly, which I think will be sufficient to keep you in great comfort. Of course, if I hear of your behaving ill, or bringing up your child improperly, I will stop the allowance to you :”—Held, by WILDE, C. J., and MAULE, J. (*dissentiente* V. WILLIAMS, J.), that the letter disclosed a sufficient consideration for a promise to pay the annuity, viz. the mother's properly bringing up the child. *Hicks v. Gregory.* 378

APPOINTMENT.

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ARBITRAMENT.

- I. *Under the Lands-Clauuses-Consolidation Act, 1845 (8 & 9 Vict. c. 18).*

1. A. agreed to let, and B. agreed to hire, a piece of land containing about 15 acres, at an annual surface-rent,—B. to use the land for the purpose of making bricks, and to pay to A., his executors, &c., 3*s.* per 1000 on the

quantity made, the quantity made to be not less than 4,000,000 annually; the ground not to be excavated beyond the depth of eight feet, without the special permission of A. in writing. A portion of the land being required by a railway company, B.'s claim for compensation in respect of his estate and interest in the land so required, and for deterioration to the residue, was referred to arbitration, under the provisions of the land-clauses-consolidation act, 1845,—8 & 9 Vict. c. 18. The umpire, by his award, found that the interest of B. under the above agreement was that of merely a *tenant from year to year*; and he assessed the compensation upon that basis:—Held, that the construction put by the umpire upon the agreement was correct; and that evidence tending to show that by the custom of the brick-making trade, brick land is never hired *from year to year*, was properly rejected. *In re Stroud.* 502

2. *Quære*, as to the power of the court to interfere, even if the decision of the umpire had been wrong. *Ib.*

II. Attachment for Non-Performance of Award.

- Service.*—1. To constitute a proper service of an award, a copy must be delivered to the party, and the original must, at the same time, be shown to him. *Lloyd v. Harris.* 63
2. Where the copy was personally delivered to the party on the 21st of October, and a demand of performance made on the 23d, the original being then for the first time shown:—Held, that this was not such a service as to form the foundation either of an attachment or of a rule under the 1 & 2 Vict. c. 110, s. 18. *Ib.*

And see AGREEMENT.

ASSURANCE.

See INSURANCE.

ATTORNEY.

I. Certificate.

Disability to sue.—The 26th section of the 6 & 7 Vict. c. 73, only disables an uncertificated attorney from suing for fees, rewards, or disbursements for any business, matter, or thing done by him as an attorney or solicitor *in some suit or proceeding in one of the courts mentioned in the act.* *Greene v. Reece.* 88

II. Bill of Costs.

An attorney's bill is not in compliance with the provisions of 6 & 7 Vict. c. 73, unless it furnish reasonable information, showing in what court and in what cause each item charged for, has been transacted. *Dimes v. Wright.* 831

And see COUNTY COURT, II.

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ARBITRAMENT.

BANKRUPT.

I. Petitioning Creditor's Debt.

Since the statute 6 & 7 Vict. c. 85, the bankrupt is an admissible witness to prove the petitioning creditor's debt. *Groom v. Watson.* 217

II. Rights of Assignees.

A plea of mutual credit by way of set-off, cannot be pleaded to a declaration by assignees, charging the defendants with having received a sum of money from the bankrupt for the purpose of meeting a certain acceptance, and neglecting so to apply it, whereby the bankrupt's estate sustained damage,—the claim being for *unliquidated damages.* *Bell v. Carey.* 887

III. Election by Proof under Fiat.

Proof for Costs only.—The plaintiff obtained a verdict and judgment for 500*l.* damages, and 135*l.* 6*s.* costs: the defendant afterwards became bankrupt, and the plaintiff proved under the fiat for the costs only:—The court refused to enter a suggestion of the proof upon the roll,—there being no precedent, and, in the opinion of the court, no necessity, for it. *Sainter v. Fergusson.* 619

IV. Protected Transactions, under 1 W. 4, c. 7, s. 7.

After declaration, in an action adversely brought, and without collusion, the defendant consented to a judge's order for payment of debt and costs forthwith, the plaintiff to be at liberty, in case of default, to sign judgment and issue execution for the amount:—Held, that a judgment signed thereon was a judgment by *nil dicit*, and within the protection of the 1 W. 4, c. 7, s. 7. *Bell v. Bidgood.* 763

V. Supersedeas.

The production of a *supersedeas* is sufficient proof of the issuing of a fiat, and of the fact of its having been superseded. *Wright v. Colls.* 150

BARON AND FEME.

See HUSBAND AND WIFE.

BILL OF EXCHANGE.

I. Payable at a Particular Place.

1. In debt by the payee against the maker of a promissory note payable at "No. 11, Old Slip," the declaration stated, that, "when the said promissory note became due, to wit, on, &c., the plaintiffs were ready and willing in

due manner to present the said note to the defendant, at the said No. 11, Old Slip, for payment, and then and there to demand of the defendant payment of the said note, and the plaintiffs would have duly presented the same to the defendant, and demanded payment thereof accordingly, but the defendant was then absent from, and not to be found at, the said No. 11, Old Slip, and had then clandestinely departed and absconded from thence, without leaving or having left any effects at the said place, or any means or provision there for the payment of the said note, nor were there any effects of the defendant at the said No. 11, Old Slip, nor any means or provision there for payment of the said note, and the defendant did not pay the said note when it became due, &c.:"—Held, that the declaration failed to disclose a cause of action, by reason of the note not having been presented according to its exigency, and no sufficient legal excuse being shown for the omission.

Sands v. Clarke. 751

2. A promissory note described in the body of it as "payable on the last day of October. At A. B.'s,"—must, by the law of England, be presented at the place named; and the latter words are not to be treated as a mere memorandum, because separated from the former by a full point. *Vander Donckt v. Thelluson.* 812

II. Memorandum of Place of Payment.

A note payable to the order of the maker, and by him endorsed in blank, may be treated as a note payable to bearer; and that notwithstanding there is a memorandum at the foot of the note, indicating a particular place of payment. *Masters v. Baretto.* 433

III. Custom as to remitting Bills.

1. The purchaser or remitter in London, of a foreign bill, getting from the drawer, according to the usage in London, credit until the next foreign post day for the amount, and delivering the bill to the payee, who receives it *bonâ fide* and for value, the drawer is liable for the amount to the payee, although, in consequence of the purchaser or remitter's failure before the next foreign post day, the drawer never receives value for it. *Munroe v. Bordier.* 862
2. The declaration stated that A. (the defendant) made a bill of exchange, and directed it to B., a merchant in France, requiring him to pay the amount to the order of C. (the plaintiff); that A. delivered the bill to D., who delivered it to C.; and that B. refused payment, &c. A. pleaded that he made and delivered the bill to D. for the use of C., on the faith and terms of being paid the price and value thereof accord-

ing to the usage of merchants in that behalf, that is to say, on the next foreign post day; that neither C. nor any other person, then, or at any time before or since, paid him the said price or value of the bill, or any part thereof; that he never had any value or consideration for the making or delivery of the bill; and that C. always held and still held the same without any value or consideration whatever to him (A.) for the same. Replication, that after the making of the bill, and before it became due, D., who appeared to be, and whom C. believed to be, the lawful holder, delivered the bill to him for a good and valuable consideration, and without notice of the premises in the plea mentioned:—Held, that the plea was no answer to the action; and that, even if it were sufficient to call upon C. to show *bonâ fides*, he did so by his replication. *Id.*

IV. Pleas of Want of Consideration, Fraud, &c.

1. To a count on a promissory note made by the defendant, payable to the order of A., and endorsed by A. to B., and by B. to the plaintiff, the defendant pleaded that the note was obtained from him by D. and others in collusion with him, by fraud; that there was no consideration for the endorsement by A. to B.; and that the plaintiff had notice of the fraud:—Held, bad, there being nothing to impeach A.'s title to the note. *Masters v. Ibberson.* 100
2. A further plea stated that the consideration for the note was the forbearance to prosecute the defendant's son upon a charge of felony, —not averring that a felony had been committed, or affecting A., the payee, with notice of the alleged illegality of the consideration:—Held, bad. *Id.*

V. Proof of Endorsement.

1. Upon an issue as to the endorsement of a promissory note by J. S., it was proved, that the wife of J. S. had the general management of his business; that she was in the habit of drawing, accepting, and endorsing bills and notes in his name; and that the name of J. S. was endorsed upon the note in question by his daughter, by the direction and in the presence of her mother, by whom the note was afterwards handed to the plaintiff:—Held, that it was a question of fact for the jury, whether the endorsement so made was within the scope of the wife's authority; and that the evidence warranted them in concluding that it was. *Lord v. Hall.* 627
2. In assumpsit on a promissory note made by the defendant, payable to J. H., and endorsed by J. H. to the plaintiff,—it appeared that there were two persons of the same name, father and son, and there was no evidence to show to which of them the note had been

given; but it appeared that the endorsement was in the handwriting of J. H. the son:—Held, that, although *prima facie* the presumption would be that J. H. the father was meant, that presumption was rebutted by the son's endorsement. *Stebbing v. Spicer*. 827

BROKER.

Proof of Foreign Law by—See EVIDENCE, III.

CASE.

For Negligence.

1. *Negligent driving.*—One who sustains an injury from a collision with a carriage or a vessel, cannot maintain an action against the owners of such carriage or vessel, if negligence either on his own part, or on the part of those having the guidance of the carriage or vessel in which he is a passenger, conduced to the accident, and such injury might have been avoided by the exercise of reasonable care on his part or their part. *Thorogood v. Bryan*, and *Cuttlin v. Hills*. 115
2. *Imperfect Construction of Machinery.*—In case against engineers for so negligently constructing and erecting a machine, that it exploded, and killed the husband of the plaintiff, the defendants pleaded, that, at the time of the accident, the machine was unfit for use, by reason of the dampness of the brick-work in which it was set; that they so informed the deceased, and cautioned him not to use it; and that, by reason of the premises, the machine exploded, as in the declaration mentioned,—concluding with a verification:—Held, that the plea did not present a confession and avoidance of the whole cause of action, but was an informal traverse of a part only, and therefore bad. *Dakin v. Brown*. 92

CERTIFICATE.

- I. *Attorney's Certificate—See ATTORNEY, I.*
- II. *Of Registration under 7 & 8 Vict. c. 110.—See JOINT-STOCK COMPANY.*
- III. *Scrip Certificates—See RAILWAY SHARES.*

CHARTER-PARTY.

Construction of.

Stipulation as to Freight.—By a charter-party it was agreed that the ship should proceed to Baltimore, and there load a full cargo of produce, and proceed therewith to the United Kingdom, and deliver the same, on being paid freight "at and after the rate of 5s. 6d. per barrel of flour, meal, and naval stores, and 11s. per quarter of 480 lbs. for indian corn or

other grain;" that the cargo was not to consist of less than 3000 barrels of flour, meal, or naval stores; and that not less flour or meal than naval stores was to be shipped. The vessel arrived here with a cargo consisting of 769 hhds. of tobacco, 6047 bushels of bran, 2000 bushels of oats, 5000 oak-staves, and 3 barrels of flour. The evidence showed, that a quarter of indian corn or wheat weighing 480 lbs. would occupy a space of 10½ cubic feet, and that a quarter of American oats, which weighed upon an average 272 lbs., would occupy a space of 16 cubic feet. It also appeared that oats were not a usual shipment from America:—Held, that "other grain," in this charter-party, must be taken to mean such description of grain as would average 480 lbs. to the quarter, and therefore to exclude oats; and that the ship-owner was entitled to receive freight upon the supposition that 3000 barrels of flour, meal, or naval stores had been shipped, and, for the rest of the space, at the rate of 11s. per quarter of indian corn, or other grain of the average weight of 480 lbs. to the quarter. *Warren v. Peabody*. 800

COHABITATION.

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- I. *Failure of—See CONTRACT, III.*
- II. *Want or Illegality of—See BILLS OF EXCHANGE, IV.*

CONSTRUCTION OF DOCUMENTS.

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CONTRACT.

I. Construction of.

The plaintiffs, merchants in London, ordered of the defendant, a merchant at Singapore, two parcels, of 25 tons and 150 tons respectively, of terra japonica, "provided it can be laid down here, all charges included, at 18s. per cwt." The defendant sent to the plaintiffs invoices and bills of lading representing that two parcels, of those respective weights, had been shipped to their order, and, at the same time, drew bills upon them for the price, which the plaintiffs, upon the faith of the representation contained in the invoices and bills of lading, accepted, and duly paid. Upon the arrival of the goods in London, the

net weight,—exclusive of packages, which consisted of baskets and leaves,—proved to be 24 tons and 132½ tons only. The plaintiffs took the goods, and sold them; and now brought money had and received to recover back the sum overpaid, as upon a partial failure of consideration. Upon a special case, stating it to be the custom at Singapore to purchase terra japonica by gross weight as packed, and in London to sell it *net*:—Held, that the plaintiffs were entitled to recover. *Devaux v. Conolly.* 640

II. Time for Performance.

1. A contract to be performed "directly," means, to be performed, not "within a reasonable time," but "speedily," or, at least, "as soon as practicable." *Duncan v. Topham.* 225
2. On the 18th of February, the plaintiff wrote to the defendant, offering to supply him with linseed cake at 10*l.* 15*s.* per ton: on the 19th, the defendant replied, "I can take five tons at 10*l.* 10*s.*, but it must be put on board *directly*:" and on the 22d, the plaintiff again wrote, "I shall ship you five tons best cakes *to-morrow*:"—Held, that this correspondence did not prove a contract on the part of the defendant to accept cake "to be delivered within a *reasonable time*." *Id.*
3. A contract is complete upon the posting by one party, of a letter addressed to the other, accepting the terms offered by the latter, notwithstanding such letter never reaches its destination. *Id.*

III. Failure of Consideration.

1. By agreement between A. and B.,—reciting that B. had, as he was advised and believed,—legally and effectually put an end to a certain lease granted to C., and dated the 18th of July, 1839, of a certain farm, &c., by entry thereon under a power therein contained, by reason of the bankruptcy of C.; and that B. had agreed to grant a lease of the farm, &c., to A., for twenty-one years from the 29th of September, 1844, at the same rents, &c., as the same had been held by C.,—it was agreed that B. should grant and A. accept a lease, at a certain rent, payable quarterly,—the said lease to commence on the said 29th of September, 1844, if the defendant could then legally make and execute the same, or as soon after as the defendant would be in a situation to grant the same; that such lease should contain the same covenants, &c., as the lease to C.; and that A. should pay to B., on possession being delivered to him, 500*l.* as a premium for the lease so to be granted. A. was let into possession, and occupied the farm for about two years, paying the rent; and he also, within that time, paid B. 250*l.* in part of the 500*l.* premium; but, the *flat* against

C. having been superseded, B. was unable to grant the lease to A. A. thereupon brought an action for the breach of contract, alleging in his declaration, that he had always been ready and willing to accept a lease, that the 29th of September, 1844, and a reasonable time for B. to grant the lease, had elapsed, and that B. was in a situation to grant a lease. A. also sought to recover back the 250*l.* as money had and received, upon a failure of consideration:—Held, that the recital in the agreement, and proof of declarations made by B. that C.'s lease was void and good for nothing, were *prima facie* evidence, as against B., that he had power to grant the lease: But that, it appearing also by the recitals in the agreement, that the lease to C. was supposed to be void by reason of C.'s bankruptcy, such *prima facie* case was rebutted by proof of the *supersedeas* of the *flat* against C.; and, consequently, that B. was entitled to the verdict upon an issue as to his ability to grant the lease. *Wright v. Colla.* 150

2. Held, also, that the production of the *supersedeas* was sufficient proof of the issuing of the *flat* against C., and of the fact of its having been superseded. *Id.*
3. But, held, that A. was entitled to recover back the 250*l.*, as money paid upon a consideration which had failed. *Id.*

And see MASTER AND SERVANT.

VENDOR AND PURCHASER.

COPYRIGHT.

See DRAMATIC COPYRIGHT.

CORRESPONDENCE.

See COSTS, II. 1.

COSTS.

I. *Bill of*.—See ATTORNEY, II.

II. Taxation of.

1. *Cause made a Remanet.*—A cause having been made a remanet, a correspondence took place between the respective attorneys with a view to a reference, which failed:—Held, that the master exercised a proper discretion in disallowing copies of this correspondence, as part of the briefs, in taxing the costs of the cause. *Pilgrim v. The Southampton and Dorchester Railway Company.* 25
2. *Plans.*—Costs of preparing plans, for the better elucidating of the case before the court and jury, may be allowed, at the discretion of the master. *Id.*
3. *Witnesses.*—The master is the sole judge of the proper number of witnesses to be allowed in support of the same matters. *Id.*

Upon the taxation of the defendant's costs of issues upon which he has succeeded, an affidavit that the witnesses whose expenses he claims were called *exclusively* to support those issues, is not indispensable, provided the master is satisfied of the fact by other means. *Id.*

III. Of Motions and Rules.

1. A defendant, who after issue joined obtained his discharge under the insolvent debtors acts, 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, was allowed to plead such discharge *puis darrain continuance*, without an affidavit (under Reg. Gen. Hilary term, 4 W. 4), that the matter of the plea arose within eight days next before the pleading thereof,—it being shown that the omission to plead within the prescribed time, had not arisen from any culpable conduct on his part, and had occasioned no disadvantage to the plaintiff: but (MAULX, J., *dissentiente*) the court allowed the plaintiff the costs of opposing the rule for that purpose. *Dunn v. Loftus.* 76
2. *Semble*, that this court will not give costs where a rule is discharged *solely* on the ground that the affidavit upon which it is founded has a defective jurat. *The Duke of Brunswick v. Slowman.* 617

IV. Of Action on a Judgment, under 43 G. 3, c. 46, s. 3.

It is no answer to a motion, under the 43 G. 3, c. 46, s. 4, for the costs of an action upon a judgment, that the original cause of action (in which the defendant had suffered judgment by default) was one for which the plaintiff might have levied a plaint in the county-court, under the 9 & 10 Vict. c. 96. *Slater v. Mackay.* 553

V. In Replevin, under the Tithes-Commutation Act, 6 & 7 W. 4, c. 71, s. 81.

The owner of a rent-charge in lieu of tithes, distraining under the 81st section of the 6 & 7 W. 4, c. 71, and afterwards obtaining judgment in an action of replevin, is not entitled to double costs under the 11 G. 2, c. 19, s. 22; neither, consequently, is he entitled to the "full and reasonable indemnity as to costs," substituted for double costs, by the 5 & 6 Vict. c. 97, s. 2. *Newnham v. Bever.* 560

COUNTY-COURT.

I. Prohibition.

A defendant sued in a county-court as an executor, pleaded *plene administravit*, and judgment was given for the plaintiff, for the debt, to be levied of assets *quando acciderint*. The plaintiff afterwards took out a summons, suggesting a *decree*:—Held, no ground for a

COUNTY-COURT.

prohibition,—although the summons was irregular, in not stating that the assets had come to the defendant's hands *after judgment.* *Ellis v. Watt.* 614

II. Suggestion under 9 & 10 Vict. c. 95, s. 129.

1. The plaintiff, on the 7th of June, recovered a verdict for 9*l.* 2*s.* 1*d.* in an action of contract, before the under-sheriff. The writ of trial was returnable on the 8th:—Held, that the defendant was in time on the 11th of June, to move to enter a suggestion, under the 9 & 10 Vict. c. 95, s. 129, to deprive the plaintiff of costs; and that it was not necessary first to move to set aside the judgment, if any. *Read v. Blayney.* 551
2. The plaintiff, having signed judgment and issued a *fi. fa.* for the damages and costs on the 11th of June, and the defendant having paid the amount under protest,—the court afterwards made absolute a rule calling upon the plaintiff to refund the costs. *Id.*
3. *Plaintiff suing in Formâ Pauperis.*—The judge of a county-court has power under the 9 & 10 Vict. c. 95, s. 78, to allow parties to sue before him *in formâ pauperis.* *Chian v. Bullen.* 447
4. Where, therefore, a plaintiff suing *in formâ pauperis* in the superior court, recovered less than 20*l.* in an action of debt, the court ordered a suggestion to be entered, to deprive him of costs. *Id.*

III. Splitting Demands.

- A. having a demand against B. for 17*l.* and 21*l.* 10*s.*, in respect of two several parcels of goods, levied a plaint against him in the county-court for the first-mentioned sum: on the day appointed for the hearing, A. did not appear; whereupon, B. admitting the cause of action, the judge pronounced judgment for A. for 17*l.* A. afterwards brought an action in this court for the 21*l.* 10*s.*; to which B. pleaded the recovery against him in the county-court,—averring that A. had at the hearing *abandoned the excess of his demand* beyond the 17*l.*, pursuant to the 63d section of the 9 & 10 Vict. c. 95:—Held, on a traverse of that allegation,—that the above facts disproved the plea; for, that the mere levying a plaint for a part of the demand, was not, *per se*, an abandonment of the excess. *Vines v. Arnold.* 632

IV. Warrant of Commitment.

1. The judge of an inferior court of record who has made an order *simpliciter* for the payment of a debt by instalments, cannot, upon non-payment, issue his warrant for the imprisonment of the debtor, without giving him

an opportunity of being heard as to the cause of such non-payment. *Kinning v. Buchanan*.

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2. Where, therefore, in trespass by A. against B. for false imprisonment, B. pleaded that J. S. recovered a judgment against A., in the sheriff's court, London,—that A. was summoned, and appeared before the judge of that court, who ordered the sum recovered to be paid by instalments,—that the first instalment was demanded and not paid,—that the judge duly, by warrant under his hand and seal, according to 8 & 9 Vict. c. 127, ordered the officer of the court to take A., and convey him to prison for forty days:—and that B., as the attorney of J. S., delivered the warrant to the officer, who took A. Replication, that, by this order, it was not directed that A. should be committed, *modo et forma*:—Held, that the warrant issued did not support the plea, which must be taken to aver the existence of a legal warrant. *Ib.*

3. Held also, that the defendant, having acknowledged actual participation in the act of trespass, by pleading in confession and avoidance, could not protect himself, upon this issue, by showing that he had acted merely as the attorney of J. S. *Ib.*

V. Trespass against Bailiffs of, for Illegal Execution of Process.

Where a warrant issues upon a judgment of a county-court against a party resident within another jurisdiction, and is sealed by the clerk of the court there, under the 104th section of the 9 & 10 Vict. c. 95, the high-bailiff of the court out of which the warrant originally issued, is not responsible for any irregularities in its execution by the under-bailiff of the foreign jurisdiction, even though his own under-bailiff assists therein. Under a warrant so issued by one court, and sealed by the clerk of another court, the officers broke and entered the premises of a third person, under a mistaken impression that the party against whom the warrant was directed, was there; and, upon the owner of the premises resisting their entry, the bailiffs, under colour of the 114th section of the statute, took him into custody, and carried him before a magistrate:—Held, that the high-bailiff of the court from which the warrant was re-issued, was liable with the under-bailiffs for the breaking and entering, which was an act done by the latter under the supposed authority of the writ; but not for the assault, which was committed in the assertion of a power given by the statute to the individual officer obstructed. *Smith v. Pritchard*. 565

COVENANT.

Construction of.

A lease was granted of a farm and tenement, and the quarries of paving and tile-stone in and upon the premises, with liberty and power to open and work the quarries, subject to an annual rent for the premises, excepting the quarries, and to the payment of a royalty for the stone obtained. Out of this demise were reserved and excepted "all timber-trees, trees likely to become timber, saplings, and all other wood and underwood, which then were, or which should at any time thereafter be, standing, growing, and being on the premises, and all mines, minerals, &c., which should thereafter be opened and found." And the lease contained a covenant "not to commit any waste, spoil, or destruction, by cutting down, lopping, or topping any timber-trees, or trees likely to become timber, saplings, or any other wood or underwood;" and a power of re-entry, for non-payment of rent, or if the lessee, &c., should commit any waste, spoil, or destruction by any of the means or ways aforesaid, and should not perform and keep all and singular the covenants, &c., contained in the lease. The assignee of the term having cut down and grubbed up certain saplings, wood and underwood, for the necessary purpose of working a quarry on the demised premises:—Held, that the effect of the covenant was, that the tenant should not so cut any of the trees excepted, as that such cutting should amount to an excess of the right which it was intended that he should exercise; and therefore that cutting trees in a manner necessary to a reasonable exercise of the power to get stone, was no breach of the covenant. *Doe d. Rogers v. Price*. 894

DAGUERREOTYPE.

See LETTERS PATENT.

DAMAGES.

See BANKRUPT, III.

MASTER AND SERVANT, 2.

SHERIFF, 3.

DE INDEMPITATE NOMINIS.

Writ—See Stebbing v. Spicer, 827.

DEBTOR AND CREDITOR.

Letter of License.

A., a trader, entered into an arrangement, by deed, with his creditors, by which it was agreed that he should have a letter of license for five years, during which period he should

carry on the trade under the inspection of certain persons therein named; and it was provided, that, if any creditor should, during the continuance of the license, *molest or interfere with A.*, contrary to the true intent and meaning of the indenture, A. should thenceforth be relieved, exonerated, acquitted, and discharged of and from all debts and demands of the creditor by whom the letter of license should be so contravened, *and that the said indenture should or might be pleaded in bar to such respective debts or demands accordingly*:—Held, that the bringing of an action by a creditor, party to the deed, within the five years, was a “molestation or interference” with A., within the meaning of the proviso; and that the indenture operated as a defeasance, and was pleadable in bar as such. *Gibbons v. Vouillon.* 483

DEER.

See PARK.

DEFAMATION.

See SLANDER.

DEFEASANCE.

See DEBTOR AND CREDITOR.

DELIVERY.

See SALE.

DEVISE.

Construction of.

Estate-tail.—Testator devised as follows:—“I give and devise to my son Stephen, a small field at, &c., to hold to my said son Stephen for and during the term of his natural life: and, from and after his death, then I give and devise the same to the issue of his body lawfully begotten, if more than one, equally amongst them; and, in case he shall not leave any issue of his body, lawfully begotten, at the time of his death, then I give and devise the same to my heir or heirs-at-law.”—Held, that Stephen, the son, took an estate-tail. *Doe d. Cannon v. Eucastle.* 876

DISSENTING MINISTER.

Words spoken of—See SLANDER, I.

DOUBLE COSTS.

See COSTS, V.

DOWER.

1. In a writ and count in dower, the exact number of acres of land in respect of which dower is demanded, is not material: in order, there-

fore, to sustain a plea alleging that the tene-ments mentioned in the count were subject to an outstanding term, it is sufficient for the tenant to show that *all* the lands held by him in the parishes named in the count are subject to the term. *Garrard, dem., Tuck, ten.* 231

2. Where an enclosure act provides that every proprietor shall stand and be seized of the lands to be allotted to him; to such and the same uses, and for such and the same estates, as the lands in respect of which such allotments shall be made, would have been subject to in case the act had not been made,—the allotments made under it are held subject to an outstanding term to which the original lands were subject. *Id.*
3. Perfect identity of description and quantity is not, under such circumstances, necessary. *Id.*
4. The surrender of a term assigned to attend the inheritance, is not to be presumed unless there has been a dealing with the estate in a way in which reasonable men would not have dealt with it unless the term had been put an end to. *Id.*
5. The object of the statute 3 & 4 W. 4, c. 27, was, to settle the rights of persons adversely litigating with each other; not to deal with cases of trustee and *cestui que trust*, where there is but one single interest, viz. that of the person beneficially entitled. *Id.*
6. A *cestui que trust* who enters into possession of land, becomes, at law, tenant at will to the trustee: where, therefore, the equitable owner of an estate, a term in which has been assigned to attend the inheritance, is in possession, the right of entry under the 2d section of the 3 & 4 W. 4, c. 27, accrues only upon the determination of the tenancy at will resulting from such possession. *Id.*
7. The 3d section of the 3 & 4 W. 4, c. 27, does not apply to the case of *cestui que trust* holding possession of land under the trustee. *Id.*

DRAMATIC COPYRIGHT.

Action for Infringement of.

1. No one can be considered as an offender against the provisions of the dramatic-copy-right act, 3 & 4 W. 4, c. 15 (extended to musical compositions by the 4 & 5 Vict. c. 45, s. 20), so as to be liable to an action at the suit of the author or proprietor, unless he, by himself, or his agent, actually takes part in the representation which is a violation of the copyright. *Russell v. Bryant.* 836
2. Therefore, one who merely lets a room to the offender, is not liable, even though he supplies the benches and lights, or sells a ticket of ad-

mission,—himself deriving no other profit than that arising from the letting of the room. *Russell v. Briant.* 836

DUPLICATE.

See WILL.

ENCLOSURE ACT.

Construction of.

1. Where an enclosure act provides that every proprietor shall stand and be seised of the lands to be allotted to him, to such and the same uses, and for such and the same estates, as lands in respect of which such allotments shall be made, would have been subject to in case the act had not been made,—the allotments made under it are held subject to an outstanding term to which the original lands were subject. *Garrard, dem., Tuck, ten.* 231
2. Perfect identity of description and quantity is not, under such circumstances, necessary. *Id.*

ENROLMENT.

See IRISH JUDGMENT.

ENTRY, RIGHT OF.

See DOWER.

ERROR, WRIT OF.

See WRIT OF ERROR.

ESTATE-TAIL.

See DEVISE.

EVIDENCE.

I. *Admissibility of Witness.*

Bankrupt.—Since the statute 6 & 7 Vict. c. 85, the bankrupt is an admissible witness to prove the petitioning creditor's debt. *Groom v. Watson.* 217

II. *Construction of Documents.*

Prima facie, the construction of written documents is for the judge; but, where it is shown by extrinsic evidence that the terms are ambiguous, evidence is admissible to explain the ambiguity; and then it is for the jury to say in which sense the ambiguous expressions were used. *Smith v. Thompson.* 44

III. *Proof of Foreign Law.*

1. The law of a foreign country on a given subject, may be proved by any person who (though not a lawyer or a person, who, by reason of his having filled any public office, may be presumed to be acquainted with the

law) is, or has been, in a position to render it probable that he would make himself acquainted with it. *Vander Donck v. Thelluson.* 812

2. Therefore, an hotel-keeper in London, a native of Belgium, who stated that he had formerly carried on the business of a merchant and commissioner of stocks in Brussels, was permitted to prove the law of Belgium on the subject of the presentment of a promissory note made in that country payable at a particular place. *Id.*

IV. *Identity of Payee of a Promissory Note.*

In assumpsit on a promissory note made by the defendant, payable to J. H., and endorsed by J. H. to the plaintiff,—it appeared that there were two persons of the same name, father and son, and there was no evidence to show to which of them the note had been given; but it appeared that the endorsement was in the handwriting of J. H. the son:—Held, that, although *prima facie* the presumption would be that J. H. the father was meant, that presumption was rebutted by the son's endorsement. *Stebbing v. Spicer.* 827

V. *Declarations*—*See CONTRACT.*

VI. *Recitals*—*See CONTRACT, III. 1.*

VII. *Of Assignment of Irish Judgment*—*See IRISH JUDGMENT, 2.*

VIII. *Of Custom of Trade.*

Not admissible to control or explain a written contract. *In re Stroud.* 502

EXAMINED COPY.

See IRISH JUDGMENT, 2.

EXIGENT.

Tests of—*See OUTLAWRY*

FALSE IMPRISONMENT.

See COUNTY COURT, IV., V.

FELONY.

See BILL OF EXCHANGE, IV. 2.

FOREIGN LAW.

Proof of—*See EVIDENCE, III.*

FRAUD.

See BILL OF EXCHANGE, IV. 1.

FRAUDS, STATUTE OF.

See SALE.

FREIGHT.

See CHARTER-PARTY.

GUARANTEE.

Construction of.

In Consideration of past and future Credit.—1.

"In consideration of E. R. & Co. giving credit to D. J., I hereby engage to be responsible, and to pay any sum, not exceeding 120*l.*, due to the said E. R. & Co., by the said D. J.:"—Held, to be a good and binding guarantee, the words "giving credit" being equally applicable to future as to past credit. *Edwards v. Jevons.* 436

2. In an action upon this guarantee, the declaration stated, that, at the time it was given, D. J. was indebted to the plaintiffs in 46*l.* for goods sold, and which sum was then payable; that the plaintiffs had sold other goods to D. J., to the amount of 50*l.*, at a credit which had not yet expired; that D. J. had applied to the plaintiffs for an extension of credit in respect of both debts, and also for a further supply of goods on credit,—which the plaintiffs had consented to do on receiving the defendant's guarantee; that the defendant, in consideration of the premises, gave the plaintiffs the guarantee above set out; and that D. J. made default, &c. :—Held, on special demurrer, that the declaration sufficiently showed that the consideration for the guarantee was future credit, and was therefore good. *Ib.*

HIRING.

Contract of—See MASTER AND SERVANT.

HUSBAND AND WIFE.

Endorsement of Promissory Note by the Wife—
See BILLS OF EXCHANGE, V. 1.

ILLEGITIMATE CHILD.

See ANNUITY.

INDEMNITY.

As to Costs, under 5 & 6 Vict. c. 97, s. 2.—See
COSTS, V.

INSOLVENT DEBTOR.

Discharge, under 1 & 2 Vict. c. 110.

1. *Costs.*—The adjudication of the commissioner under the insolvent debtors act, 1 & 2 Vict. c. 110, s. 90, discharges the insolvent from all debts due or growing due at the time of the petition, to creditors, or to persons claiming to be creditors. *Berry v. Irwin.* 532

An insolvent inserted in his schedule the name of A., in whose hands he had placed two bills of exchange for the purpose of their being discounted. After the schedule was filed, he discovered that A. had endorsed the bills to B., and accordingly obtained leave to amend the schedule by inserting B.'s name therein, stating the circumstances under which the bills came to B.'s hands. B. sued the insolvent on the bills, and obtained a verdict at the assizes against him on the morning of the day on which the order of adjudication was made, and proceeded thereon to judgment and execution :—Held, that the insolvent was entitled to be discharged as to the action, both in respect of debt and costs,—although the costs were incurred after the filing of the petition. *Ib.*

2. *Plea of pias darrein continuance.*—A defendant, who after issue joined obtained his discharge under the insolvent debtors acts, 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, was allowed to plead such discharge *pias darrein continuance*, without an affidavit (under Reg. Gen. Hilary term, 4 W. 4), that the matter of the plea arose within eight days next before the pleading thereof,—it being shown that the omission to plead within the prescribed time, had not arisen from any culpable conduct on his part, and had occasioned no disadvantage to the plaintiff: but (*MAULE, J., dissentiente*) the court allowed the plaintiff the costs of opposing the rule for that purpose. *Dunn v. Loftus.* 76

INSURANCE.

Loss of Freight.

1. The ship *Lord Cochrane*, with a cargo on board, left Pernambuco, on a voyage to Liverpool, on the 29th of June, 1839: in proceeding out of the harbour of Pernambuco, she struck on a rock, and was obliged to put back to be repaired: the master, after several surveys, and with the concurrence of the persons to whom he had been addressed by the owner to procure a cargo, proceeded to repair the ship, the repairs continuing from the 29th of June, 1839, till the 4th of January following: the expenses of the repairs amounted to 7132*l.* 3*s.* 8*d.*, a sum much exceeding the value of the ship and freight, and which sum the master, not being able to procure it in any other manner, was compelled to borrow on bottomry, and accordingly executed a bottomry-bond, charging the ship, freight, and cargo: the cargo, which had been necessarily taken out during the repairs, was reshipped, and the ship sailed on the 6th of January, 1840, and arrived with the cargo at Liverpool: the obligees of the bottomry-bond received the

freight under a decree of the court of Admiralty. It did not appear when the owner was first informed of the accident to the ship; but it appeared that a letter from Pernambuco, dated the 14th of November, 1839, and received on the 30th of December, containing an intimation that "the Lord Cochrane's expenses were likely to exceed £6000l., with commission, discharging and reloading cargo, &c.," was shown to him, and that, on the same day, he gave notice of abandonment of the ship and freight to the respective underwriters on each, and did not interfere in any way afterwards in respect of either ship or freight.

In an action against the underwriters on freight, claiming for a total loss, by a special verdict setting out the above facts, the jury found that the plaintiff had acted *bonâ fide*, without *laches*, and as a prudent owner of the ship and freight, if uninsured, would have acted:—Held,—affirming the judgment of the Exchequer Chamber,—that the plaintiff was not entitled to recover in respect either of a total or a partial loss of freight,—the freight having actually been earned, and its receipt by the obligee of the bottomry-bond being, in law, a receipt by the plaintiff. *Benson v. Chapman.* 950

2. Held also, that it is the duty of the master, in case of damage to the ship, to do all that can be done towards bringing the adventure to a successful termination,—to repair the ship, if there be a reasonable prospect of doing so at an expense not ruinous,—and to bring home the cargo, and earn the freight, if possible; that, in the absence of any finding to the contrary, it must be assumed that this duty has been properly performed; that, where the master elects to repair, the mere fact of the expenses of repair ultimately proving to be greater than the value of the ship, would not be sufficient to show that he acted beyond the scope of his authority, or to entitle the owner to treat him as ceasing to be his agent, as soon as he commenced the repairs; and that, as the special verdict did not find that the owner, if on the spot, would not have repaired the ship, the court could not infer that he would not have done so. *Ib.*
3. A partial loss of freight may be recovered upon a declaration averring for a total loss. *Ib.*

INVENTOR.

See LETTERS-PATENT.

IRISH JUDGMENT.

Assignment of.

1. Marriage does not enure as an assignment to the husband of a judgment recovered by the wife, in Ireland, before the marriage, under

the 9 G. 2, c. 5 (Irish), amended by the 25 G. 2, c. 14 (Irish), and made perpetual by the 13 G. 3, c. 19, s. 3: *Fitzgerald v. Fitzgerald.* 592

2. Under these statutes, an examined copy of the enrolment of the memorial of an assignment of such judgment, is good evidence of that assignment. *Ib.*

IRREGULARITY.

See PRACTICE, II.

JOINT-STOCK COMPANY.

- I. *Certificate of Registration, under 7 & 8 Vict. c. 110.*

1. A certificate of complete registration granted by the registrar of joint-stock companies pursuant to the 7 & 8 Vict. c. 110, s. 7, incorporates the company, according to s. 25, notwithstanding the deed omits some of the provisions required by schedule (A.) to be inserted therein. At all events, it is not competent to a shareholder, in answer to an action for a call, to object that such certificate has been granted upon the production of an insufficient deed. *The Banwen Iron Company v. Barnett.* 406

2. *Quære*, whether the judgment of the registrar, in granting or withholding a certificate, is subject to review? *Ib.*

II. *Contracts by Directors.*

1. In an action brought against a joint-stock company completely registered under the 7 & 8 Vict. c. 110, for goods ordered by persons in their employ, and supplied for the purposes of the company, and used by them in their works,—it is not necessary for the plaintiff to prove that the persons who gave the orders were authorized by the directors so to do, or that the contract was made pursuant to the provisions of the company's deed of settlement and by-laws. *Smith v. The Hull Glass Company.* 668
2. By the deed of settlement of a joint-stock company, completely registered under the 7 & 8 Vict. c. 110, it was, amongst other things, provided that it should not be lawful for the directors to contract any debts, in conducting the affairs of the company, beyond the sum of 100l. at any one time, except in the case of the purchase-money for a certain newspaper, of which the board of directors might leave unpaid any part, not exceeding 1000s., and might issue "a promissory note," or accept "a bill of exchange," on behalf of the company, for such balance:—Held, that the substance of the authority was, that the directors might contract a debt to the amount of 1000l., and secure it by a negotiable instrument; and that the directors, having contracted a debt

to that amount, were not precluded from giving security for it, *with its legal accretions, by several notes or bills*, instead of a single note or bill. *Thompson v. The Wesleyan Newspaper Association.* 849

JUDGE'S ORDER.

See BANKRUPT, IV.

JUDGMENT.

See IRISH JUDGMENT.

JURAT.

See AFFIDAVIT.

LANDLORD AND TENANT.

I. *Construction of Agreement.*

Tenancy from Year to Year.—A. agreed to let, and B. agreed to hire, a piece of land containing about 15 acres, at an annual surface-rent,—B. to use the land for the purpose of making bricks, and to pay to A., his executors, &c., 3s. per 1000 on the quantity made, the quantity made to be not less than 4,000,000 annually; the ground not to be excavated beyond the depth of eight feet, without the special permission of A. in writing. A portion of the land being required by a railway company, B.'s claim for compensation in respect of his estate and interest in the land so required, and for deterioration to the residue, was referred to arbitration, under the provisions of the lands-clauses-consolidation act, 1845,—8 & 9 Vict. c. 18. The umpire, by his award, found that the interest of B. under the above agreement was that of merely a tenant from year to year; and he assessed the compensation upon that basis:—Held, that the construction put by the umpire upon the agreement was correct; and that evidence tending to show, that, by the custom of the brick-making trade, brick land is never hired from year to year, was properly rejected. *In re Stroud.* 502

II. *Relation of Trustees and Cestui que trust.*—*See* TRUSTEE.

LAW-MERCHANT.

See 967, note A.

LEASE.

Damages for Breach of Contract on Sale of.—*See* VENDOR AND PURCHASER.

And see COVENANT.

LETTER.

Contract by.—*See* AGREEMENT, 1.

LETTER OF LICENSE.

See DEBTOR AND CREDITOR.

LETTERS-PATENT.

I. *Infringement of.*

1. In case for the infringement of a patent, the declaration alleged that the plaintiff was the inventor of certain improvements in machinery for covering fibres, applicable in the manufacture of braid and other fabrics; that the Queen had granted him a patent for his invention; and that the defendant infringed it. The defendant pleaded,—first, *non concessit*,—thirdly, after setting out the specification (which recited that the Queen had granted to the plaintiff a patent for improvements in machinery for covering fibres, applicable to the manufacture of braid and other fabrics, communicated to him by a foreigner residing abroad), that, before the granting of the patent, the plaintiff represented to Her Majesty, that, in consequence of a communication made to him by a certain foreigner, residing abroad, &c, the plaintiff, was in possession of an invention of improvements in machinery for covering fibres, applicable in the manufacture of braid and other fabrics; that Her Majesty, believing, and confiding in the truth, and acting upon the suggestion so made by the plaintiff as aforesaid, and in consideration thereof, granted the letters-patent in the declaration mentioned; and that such representation was false; whereby the letters-patent were null and void,—fifthly, that the alleged invention was not new,—eighthly, that the plaintiff did not by his specification particularly describe the nature of his invention, and in what manner the same was to be performed,—ninthly, that no sufficient specification was enrolled. At the trial, the plaintiff put in the letters-patent and specification, and gave evidence to show that a machine like his had never been in use before the date of the letters-patent:—Held, that this entitled the plaintiff to a verdict upon the issue joined on the first plea. *Nickels v. Ross.* 679
2. Held, also, that the plaintiff was entitled to a verdict on the issue joined on the third plea, *without any proof that the invention was communicated to him by a foreigner residing abroad*, as alleged in the petition recited in the specification,—a party availing himself of information from abroad, being an *inventor*, within the meaning of the 21 Jac. 1, c. 8, s. 6. *Id*

II. *Effect of Plea of Non concessit.*

And semble, that the plea of *non concessit* did not impose upon the plaintiff the burthen of shewing that the crown had power to grant,

until evidence had been given on the other side to impeach the patent; and that the averment in the declaration, that the plaintiff was the inventor of the improvements for which the patent was granted, not having been traversed, the defendant was not at liberty to controvert that fact at the trial. *Nickels v. Ross.* 679

III. Construction of Specification.

1. The specification stated the invention to relate to "certain improvements on, or additions to, the apparatus or parts constituting what are called braiding or plaiting-machines, whereby the inventor was enabled to produce, by such machines, elastic and non-elastic braids, and other fabrics, with elastic or non-elastic strands, yarns, or threads, introduced lengthwise of the fabric, and four or more in the same surface or plane, or mixtures of elastic and non-elastic fibres in combination in the same fabric,—such introduced elastic and non-elastic threads or strands proceeding lengthwise of the fabric produced, and not partaking of the movements of the braiding or plaiting threads or yarns, which, in the progress of working, twist around or over the longitudinal introduced threads, and plait or braid amongst each other." And, after describing the ordinary braiding-machine,—in which all the threads partake of like movements, and all aid in forming a fabric of plaited threads,—the specification (referring to the annexed drawings) proceeded thus to describe the new process:—"the table *a* moves on a *hollow spindle*, which is *fixed* in the framing of the machine by screw and nut at *b*1: through the tube *b*, the strand or thread of india-rubber, or of cotton, or of other fibrous material, which is to form one of the longitudinal elastic or non-elastic threads of the fabric, passes; the upper part of the tube *b* rising to such a position amongst the braiding threads, that in the evolution of those threads from one selvage to the other of the fabric, they pass under and over (and lie at the back and front of the fabric) each of the longitudinal threads or yarns; hence, the braiding will tie the longitudinal threads into a fabric, the longitudinal threads forming the length of the fabric, and the braiding threads forming the covering (when sufficiently closely worked), and the tie-threads of the fabric." The jury found that the plaintiff's machine was new, but that the use of a hollow revolving spindle or tube was not new.—Held, that, inasmuch as the plaintiff's claim was for the hollow spindle, not generally, but fixed, this finding did not negative the novelty of the plaintiff's invention; and therefore that he was entitled to a verdict on the issues

joined on the fifth, eighth, and ninth pleas. *Nickels v. Ross.* 679

2. In the construction of a specification, the whole instrument must be taken together, and a fair and reasonable interpretation given to the words used in it. *Beard v. Egerton.* 165
3. A specification of a patent for "a new and improved method of obtaining the spontaneous reproduction of all the images received on the focus of the camera obscura," in describing the process, stated it to be divided into five operations:—"The first consists in polishing and cleaning the silver surface of the plate, in order to properly prepare or qualify it for receiving the sensitive layer or coating (iodine), upon which the action of the light traces the design; the second operation is, the applying that sensitive layer or coating to the silver surface: the third, in submitting in the camera obscura the prepared surface or plate to the action of the light, so that it may receive the images: the fourth, in bringing out or making appear the image, picture, or representation, which is not visible when the plate is first taken out of the camera obscura: the fifth and last operation is, that of removing the sensitive layer or coating, which would continue to be affected and undergo different changes from the action of light,—this would necessarily tend to destroy the design or tracing so obtained in the camera obscura." It then proceeded to give a description of the first operation,—preparing the silver surface of the plate; the concluding part of which directed that nitric acid dissolved in water should be applied three different times, the plate being each time sprinkled with pounce and lightly rubbed with cotton: adding—"When the plate is not intended for immediate use or operation, the acid may be used only twice upon its surface after being exposed to heat: the first part of the operation, that is, the preparation as far as the second application of the acid, may be done at any time: this will allow of a number of plates being kept prepared up to the last slight operation: it is, however, considered indispensable, that, just before the moment of using the plates, in the camera, or the reproducing the design, to put at least once more some acid on the plate and to rub it lightly with pounce, as before stated: finally, the plate must be cleaned with cotton from all pounce dust which may be on the surface, or its edges." In a subsequent part of the specification, having described the second operation, viz. the application of the iodine, the inventor observed: "After this second operation is completed, the plate is to be passed to the third operation, or that of the camera obscura: whenever it is possible, the one operation should immediately follow

the other:—Held, that, taking the whole specification together, the direction as to the *third* application of acid, was not to be understood to be a direction to apply the acid *after the second operation*, viz. the coating the plate with iodine,—which, it was proved, would render the whole process abortive,—but to apply it as part of the *first operation*; and that the specification gave sufficient information to an operator of reasonable skill. *Beard v. Egerton.* 165

LIBEL.

Privileged Communication—See SLANDER.

LIMITATION.

Of Actions and Suits.

Under the 3 & 4 W. 4, c. 27.—1. The object of the statute 3 & 4 W. 4, c. 27, was, to settle the rights of persons adversely litigating with each other; not to deal with cases of trustee and *cestui que trust*, where there is but one single interest, viz. that of the person beneficially entitled. *Garrard, dem., Tuck, ten.* 231

2. A *cestui que trust* who enters into possession of land, becomes, at law, tenant at will to the trustee: where, therefore, the equitable owner of an estate, a term in which has been assigned to attend the inheritance, is in possession, the right of entry under the 2d section of the 3 & 4 W. 4, c. 27, accrues only upon the determination of the tenancy at will resulting from such possession. *Ib.*

3. The 3d section of the 3 & 4 W. 4, c. 27, does not apply to the case of a *cestui que trust* holding possession of land under the trustee. *Ib.*

MAPS.

See COSTS, II. 2.

MARRIAGE.

Effect of, as to the Wife's Choses in Action—See IRISH JUDGMENT.

MASTER AND SERVANT.

Contract of Hiring.

1. A. was engaged by B., as clerk, under a contract of hiring for two years, to conduct the business of a shipping agent at Southampton. In the course of such employ, it was the duty of A. to pay freight, dock-dues, &c., to meet which B. remitted the necessary funds. A. wrote to B. for a remittance of 140*l.*, enclosing an account of the purposes for which it was required,—one of them being the payment of 30*l.* for salary due to himself. Ten days afterwards, B. sent A. 100*l.* enclosed in a let-

ter directing him to apply the money for “business purposes.” A. having appropriated 30*l.* of the money in satisfaction of his salary, B. discharged him. In assumpsit by A. against B. for breach of the contract of hiring, B. pleaded a plea justifying the discharge of A., on the ground of his having wrongfully and improperly misappropriated the money remitted, and wrongfully and improperly disobeyed B.’s orders to apply the money to “business purposes.” The judge left it to the jury to say whether the plaintiff had been guilty of any wrongful and improper misappropriation of the moneys intrusted to him by the defendant, or of any wrongful or improper disobedience of orders:—Held, that this was a proper direction; and that the judge was not bound to tell the jury that it was not necessary, to justify the dismissal of the plaintiff, that he should have been guilty of any moral delinquency. *Smith v. Thompson.* 44

2. Held also, that, in awarding a sum equal to twelve months’ salary, the plaintiff having been discharged after about one quarter’s service,—the jury had not given excessive damages. *Ib.*

MEMORANDA.

Death of COLTMAN, J., 333.

Promotion of TALFOURD, J., 333.

MEMORIAL.

Of Assignment—See IRISH JUDGMENT, 2.

MINES.

See COVENANT.

MISDIRECTION.

See NEW TRIAL.

MONEY HAD AND RECEIVED.

See CONTRACT, I.

MONEY PAID.

Where maintainable.

A., being indebted to B., gave him an order upon C., his agent, who, upon its being presented, declined to pay it, but said he would set it off against a larger debt due from B. to one D., for whom C. was authorised to collect debts. C. accordingly credited B. with the amount mentioned in the order, and debited the account of D. with that amount; and D. afterwards gave A. a letter of indemnity against any proceedings B. might take against him in respect of his debt. B. having subsequently sued A., and obtained judgment against him (the action being defended in A.’s name by D.), A. paid the amount, to avoid an execu-

tion:—Held, that the circumstances raised an implied request by D. to A. to pay the money; and that the sum so paid, was recoverable against D. in an action for money paid by A. to D.'s use. *Lewis v. Campbell.* 541

And see CONTRACT, III.
RAILWAY SHARES.

MUTUAL CREDIT.

See BANKRUPT, II.

NAME.

See BILL OF EXCHANGE, V. 2.

NEGLIGENCE.

See CASE.

NEW TRIAL.

Alleged Misdirection.

It is no ground for a new trial, that the judge left to the jury as a question of fact, that which he should himself have decided as a matter of law,—unless the objection was presented to the notice of the judge at the trial. *Doe d. Strickland v. Strickland.* 724

NIL DIOTI.

See BANKRUPT, IV.

NON CONCESSIT.

Effect of—See LETTERS PATENT, II.

NOT GUILTY.

See PLEADING, II.

NUISANCE.

See PRACTICE, IV.

OUTLAWRY.

I. *Affidavit for Distingas to Outlawry.*

An affidavit for a *distingas* to outlawry, stating, that the answers to the attempts made to serve the defendant with the writ of summons at his last known residence here, were, that the defendant is abroad; that all reasonable means and diligence have been ineffectually used to serve the defendant personally, and that the deponent believes the defendant keeps out of the way to avoid service,—is sufficient; a less degree of particularity being required on such an application, than on moving for a *distingas* to compel appearance. *Dick v. Beavan.* 621

II. *Tests of Exigi Facias.*

In proceeding to outlawry by writ of summons

and *distingas*, the first *exigi facias* is properly tested on the day on which the *distingas* is returned. *Dick v. Beavan.* 621

III. *Tests of Allocatur Exigent.*

In proceeding to outlawry after final judgment, the writ of *allocatur exigent* is properly tested on the day of the return of the *exigi facias*, and need not bear teste upon the *quarto die post.* *Cox v. Beavan.* 834

IV. *Amendment of Order for Distingas.*

A judge's order for a *distingas* was made and dated on the 12th of October, upon a defective affidavit: the affidavit was amended, and re-sworn on the 13th, and the order was then delivered out as of the 12th. Upon a motion to rescind the order and subsequent proceedings thereon, the court allowed the date to be altered to the 13th, upon payment, by the plaintiff, of the costs of the amendment and of the application to rescind the order. *Dick v. Beavan.* 621

PARK.

In whom the Property in Deer.

1. Deer in a park (though an ancient and legal park) may be so tame and reclaimed from their natural wild state, as to pass to executors as personal property. *Morgan v. The Earl of Abergavenny.* 768
2. In trover by executors against the heir, for deer in a park, it appeared in evidence that the park was originally about 900 acres in extent, but that, in comparatively modern times, some adjoining land had been thrown into it; that a considerable herd of deer (600 and upwards) had always been kept therein; that the deer were attended by keepers, and fed in the winter with hay, beans, and other food; that the does were watched at falling time, and the fawns marked as they dropped; and that some of the deer were occasionally selected from the herd by means of dogs, and staled and fattened for consumption or for sale to venison-dealers. There was also a considerable body of documentary evidence to show that the park had a legal origin. In his summing up, the judge told the jury, that, by the general law, deer in a park went to the heir-at-law of the owner of the park, but that deer which were tame and reclaimed became personal property, and went by law to the personal representative of the owner of the deer, and not to the heir of the owner of the park: and he left it to them to say whether the place in question was proved by the evidence to have been an ancient park, with the legal rights of a park; telling them, that, if

it had been an ancient park, and the boundaries could not now be ascertained, though the franchise might thereby become forfeited in reference to the crown, that would not affect the question between the parties relative to the deer,—that question being, whether the deer were tame and reclaimed, which must be determined by the nature and state of the animals, and of the place in which they were kept, and their mode of treatment: and he then left them, in writing, the following questions,—1. Whether they found for the plaintiffs or for the defendant,—2. Whether they found the place to be an ancient park, with the incidents of a legal park,—3. Whether the boundaries could be ascertained by distinct marks. The jury, in answer to the second question so put, said they found the place to be an ancient park with all the incidents of a legal park; and, in answer to the third question, that the boundaries of the ancient park could be ascertained. As to the first question, they expressed a desire to abstain from answering it; but, upon being required to say whether they found for plaintiffs or for defendant, they found for the plaintiffs—observing “that the animals had been originally wild, but had been reclaimed:”—Held, that the direction was correct, and the verdict sufficient in point of law; and that the evidence was such as was proper to be submitted to the jury. *Morgan v. The Earl of Abergavenny*. 768

PAST COHABITATION.

See ANNUITY.

PATENT.

See LETTERS-PATENT.

PAUPER.

Suing in Forma Pauperis—See COUNTY COURT, II. 3, 4.

PLANS.

See COSTS, II. 2.

PLEADING.

I. Declaration on Guarantee—See GUARANTEE.

II. Not Guilty, in Case.

In case for words not actionable *per se*, averring special damage, “not guilty” puts in issue not only the speaking of the words, but also the special damage alleged. *Wilby v. Elston*. 142

III. Want of Consideration, Fraud, &c.—See BILLS OF EXCHANGE, IV.

IV. Confession and Avoidance—Post, VI., VII.

V. Defenceance—See DEBTOR AND CREDITOR.

VI. Informal Traverse.

In case against engineers for so negligently constructing and erecting a machine, that it exploded, and killed the husband of the plaintiff, the defendants pleaded, that, at the time of the accident, the machine was unfit for use, by reason of the dampness of the brick-work in which it was set; that they so informed the deceased, and cautioned him not to use it; and that, by reason of the premises, the machine exploded, as in the declaration mentioned, concluding with a verification:—Held, that the plea did not present a confession and avoidance of the whole cause of action, but was an informal traverse of a part only, and therefore bad. *Dakin v. Brown*. 92

VII. Justification in Trespass.

1. *Quare*, to what extent a seizure of goods under a *f. fa.* can be justified, when properly pleaded, where the possession of the goods has been illegally obtained. *The Duke of Brunswick v. Sloman*. 317
2. In trespass by A. against B. for false imprisonment, B. pleaded that J. S. recovered a judgment against A., in the sheriff's court, London,—that A. was summoned, and appeared before the judge of that court, who ordered the sum recovered to be paid by instalments,—that the first instalment was demanded and not paid,—that the judge duly, by warrant under his hand and seal, according to 8 & 9 Vict. c. 127, ordered the officer of the court to take A., and convey him to prison for forty days—and that B., as the attorney of J. S., delivered the warrant to the officer, who took A. Replication, that, by this order, it was not directed that A. should be committed, *modo et forma*:—Held, that the warrant issued did not support the plea, which must be taken to aver the existence of a legal warrant; and that the defendant, having acknowledged actual participation in the act of trespass, by pleading in confession and avoidance, could not protect himself, upon this issue, by showing that he had merely acted as the attorney of J. S. *Kinning v. Buchanan*. 371

VIII. Plea *puie darrein Continuance*—See INSOLVENT DEBTOR, 2.

IX. Replication de Injurid.

1. The general traverse *de injurid* can be replied to those pleas only which show that the plaintiffs had not at any time a cause of action against the defendant. *Catterall v. Less*. 113
2. Where a plea justifies a trespass under a *f. fa.*, on the ground that the outer door was open at the time of the entry and seizure, that allegation is put in issue by the replica-

tion de injuriâ. The Duke of Brunswick v. Bloomer. 317

POWER.

Of Appointment, how executed.

Attestation of Publication.—1. Certain estates were settled by deed, to the use of such person or persons, in such parts, shares, &c., as S. S. should by deed, as therein mentioned, or by her last will and testament in writing, or any writing purporting to be, or in the nature of, her last will and testament, "to be by her signed and published in the presence of, and attested by, two or more credible witnesses, direct or appoint." S. S. made a will, which was signed and sealed by her in the presence of two witnesses, to whom she at the time declared it to be her last will and testament. The attestation clause was thus—"signed and sealed in the presence of A. B., C. D."—Held, that this was a sufficient "publication," and consequently that the power was well executed. *Vincent v. The Bishop of Sodor and Man.* 905

2. A power was reserved to a married woman to dispose of personal property by her last will and testament in writing, to be by her duly made and published in the presence of, and to be attested by, two or more credible witnesses. The donee, by her will, without any reference to the power, or to the subject-matter, bequeathed to her husband "all that she did and should or would thereafter be entitled to, or should possess;" concluding thus:—"Signed by me, E. J., February 24, 1831, in the presence of two witnesses," and then followed the signatures of the witnesses:—Held, that this was not a due execution of the power. *Johns v. Dickinson.* 934

PRACTICE.

I. Service of Rules, &c.

See ARBITRAMENT, II.

II. Irregularity.

Waiver.—Obtaining time to plead (without any order or consent-summons), is a waiver of any irregularity in the rule to plead. *Carpenter v. Hall.* 84

III. Frivolous Demurrer—Post, IV.

IV. Trial.

In case against the defendants for disturbing the plaintiff in his occupation of an hotel,—the defendants pleaded that they were a joint-stock company, registered pursuant to the 8 & 9 Vict. c. 110, for the purpose of establishing and carrying on a communication, by means of steamboats, between England and certain ports of France, being a purpose of

great general and public utility and advantage; that it was necessary for them, for the purpose of carrying on the said communication, to construct and repair steamboats and other vessels, and the machinery thereof; that it was greatly for the public advantage that the said construction and repairs of the said steam and other vessels should be executed at some convenient place near to the port of F., because the same could be there done at less expense, and so the company would be enabled to charge the public lower rates or fares; that the premises where the alleged nuisances were committed, were a convenient place near to F. for the purpose aforesaid; and that the noises, &c., complained of, were necessarily and unavoidably made in the execution of such repairs, &c.

The plaintiff replied, admitting that the defendants were a joint-stock company registered pursuant to the statute, *de injuriâ sua propriâ abque residuo causâ*; and added the similitur; and, on the 7th of July, delivered the issue, with notice of trial for the then next assizes.

On the 17th of July, the defendants gave notice that they had struck out the similitur, and delivered a demurrer to the replication, on the ground that, the plea not consisting of mere matter of excuse, *de injuriâ* was inapplicable. On the 29th, a judge, on summons, set aside the demurrer as frivolous, and ordered that the issue delivered should stand, and the cause be tried accordingly. The cause was tried, and the plaintiff obtained a verdict:—

Held, that the order was properly made, and the trial regular. *Hegingbotham v. The Eastern and Continental Steam Packet Company.* 337

V. Quashing Writ of Error—See WRIT OF ERROR.

PRISONER.

Discharge from Execution—Plaintiff Dead.

The defendant was taken in execution upon a *ca. sa.* at the suit of the plaintiff, in June, 1841; in August in the same year, the plaintiff left England, and was shortly afterwards seen at St. Petersburg, but had never been heard of since. Upon an affidavit of these facts, and showing reasonable ground to induce them to believe that the plaintiff was dead, and alleging that proper search had been made, and no trace of a will or grant of administration found,—the court (in 1842) ordered the defendant to be discharged from custody, without regard to any supposed lien of the attorney for costs. *Camp v. Pote.* 375
[In a subsequent case, —*Ridsdale v. Latour, &c.*

T. 1851,—the court declined to order the prisoner's discharge; but they referred it to the master to advertise for next of kin of the plaintiff, at the defendant's cost.]

PRIVILEGED COMMUNICATION.

See SLANDER.

PROHIBITION.

See COUNTY-COURT, I.

PROMISSORY NOTE.

See BILL OF EXCHANGE.

PROTECTED TRANSACTIONS.

See BANKRUPT, IV.

PUIS DARREIN CONTINUANCE.

Plea—See INSOLVENT DEBTOR, 2.

RAILWAY COMPANY.

Arbitration under 8 & 9 Vict. c. 18.

See ARBITRAMENT, I.

RAILWAY SHARES.

Spurious Certificates.

1. On the 10th of March, 1847, A. employed B., a share-broker and member of the London Stock-Exchange, to sell for him certain documents which purported to be scrip or certificates, each for fifty shares, in a projected railway company. On the 27th B. sold these certificates to C., and handed over the proceeds to A. The certificates being subsequently found to be forged, B. was, on the 11th of May, called upon and obliged to pay (pursuant to a resolution of a committee of the Stock-Exchange) to C. a certain agreed value as for genuine certificates of that company, and which considerably exceeded the price for which he had sold the spurious certificates. In an action by B. against A. to recover the sum so paid by him to C., the declaration contained a special count avowing a promise by A. that the certificates were genuine, and a count for money paid. Upon the latter count, A. paid into court the sum he had received on the original sale, with interest:—Held, that B. was not entitled to recover upon the special count, there being no promise, express or implied, that the certificates were genuine; and that, under the count for money paid, B. was only entitled to recover the amount actually paid by him to A. *Westropp v. Solomon.* 345
2. Held, also, that the resolution of the committee of the Stock-Exchange, made after the

transaction was completed, however it might bind the members of that body, could not affect A. *Id.*

REASONABLE TIME.

See CONTRACT, II.

REGISTRATION.

Under 7 & Vict. c. 110—See JOINT-STOCK COMPANY, I.

RENT-CHARGE.

See COSTS, V.

REPLEVIN.

For Tithes-Rent-Charge—See COSTS, V.

RIGHT OF ENTRY.

See DOWER.

SALE.

Delivery and Acceptance, to satisfy the 20 Car. 2, c. 3, s. 17.

A. contracted with B. to purchase of him the trunks of certain oak trees, then felled, and lying at Hadnock, about twenty miles from Chepstow. The course was, for A.'s agent to select and mark those portions which he intended to purchase, and for B. to sever the tops and sidings and float the trunks down the river Wye to A.'s wharf at Chepstow, and there deliver them. After a portion of the timber had been delivered, and the whole paid for, B. became bankrupt: whereupon A. sent his men to B.'s premises at Hadnock, and severed and carried away the marked portions of certain trees:—Held, that no property in the trees, or any portion of the trees, which had not been delivered by B., passed to A. by the contract; and that there was no delivery or acceptance to satisfy the statute of frauds: and, consequently, that the assignees of B. were entitled to recover the value, in trover. *Acraman v. Morrice.* 449

And see VENDOR AND PURCHASER.

SCRIP.

See RAILWAY SHARES.

SHERIFF.

Illegal Seizure under a Fi. Fa.

1. Where a plea justifies a trespass under a *fi. fa.*, on the ground that the outer door was open at the time of the entry and seizure, that allegation is put in issue by the replication *de injuria*. *The Duke of Brunswick v. Stowman.* 317

2. A., a sheriff's officer, to whom a writ of *fi. fa.* was directed, offered, for a pecuniary consideration, to delay its execution for a few days. B., who exercised the office of bailiff to the sheriff, in partnership with A., afterwards illegally executed the writ by breaking open an outer door; and A. subsequently withdrew his men from possession on payment of the amount endorsed on the writ, and of a *bonus* to himself:—Held, sufficient to warrant the jury in finding A. to be a co-trespasser, as having authorized the unlawful act of his partner B. *The Duke of Brunswick v. Sloman*. 317
3. In such a case, the damages are peculiarly in the discretion of the jury: and they may include the sum paid for the withdrawal of the execution. *Id.*
4. *Quære*, to what extent a seizure of goods under a *fi. fa.* can be justified, when properly pleaded, where the possession of the goods has been illegally obtained. *Id.*

SLANDER.

Words not actionable without Special Damage.

1. *Of a School-mistress.*—The words "You are living by imposture:" "You used to walk St. Paul's Church Yard for a living,"—spoken of a woman with the intention of imputing that she was a swindler and a prostitute,—are not actionable, without special damage. *Wilby v. Eleton*. 142

In case for words not actionable *per se*, averring special damage, "not guilty" puts in issue not only the speaking of the words, but also the special damage alleged. *Id.*

2. *Of a Dissenting Minister.*—A declaration for slander and libel stated, by way of inducement, that the plaintiff was minister of a dissenting congregation at T., deriving emoluments from his said calling; that he had formerly been a draper at S., in partnership with H. P., his brother-in-law; that the partnership had been dissolved, and that there were certain accounts and money transactions between the plaintiff and H. P. in relation thereto; that false and scandalous reports concerning the plaintiff and the said partnership accounts and transactions had been circulated among the congregation at T., and it was proposed that one E. H. should examine into the said accounts and transactions, on the part of the plaintiff; and that a correspondence and discussion afterwards took place between the defendant and one R. A., relating to those accounts and transactions: the first count then proceeded to allege that the defendant, intending to injure the plaintiff in his office and character of minister of the congregation at T., and to cause him to be deprived of that office, &c., in a discourse of and

concerning the plaintiff, and of and concerning him in his said calling and ministry, and of and concerning the said partnership, and the said accounts and money transactions with H. P., spoke these words,—with proper innuendoes,—“I do not go by reports: I go by a knowledge of facts. Mr. H. (the plaintiff) is a rogue; and I can prove him to be so, by the books at S. Mr. H. pretends to say he has been as good as a father to him (meaning H. P.); but, you see, he has been robbing him. He has cheated Mr. P. of 2000*l.*: so you see what sort of a father he has been to him. I will so expose Mr. H. (the plaintiff), that he will not be able to hold up his head in T. pulpit, or any other. I said to Mr. P., I do not wish to see the books, but he desired me to come in and see them; and he told me he did not care who saw them. Mr. H. (the plaintiff) has out-generalled him in every thing (meaning, that the plaintiff had taken an unfair advantage of the said H. P., and had conducted himself in an improper manner towards him in relation to and in connexion with the said partnership and the said accounts). Now, I do not go by what I have heard; but I know it to be true.”

In the second count, the words charged were,—“Mr. H. (the plaintiff) has cheated Mr. P., his brother-in-law, of upwards of 2000*l.* Mr. H. (meaning the said E. H.) has been to S., and found all true as I represented to Mr. H. I wonder how any respectable person can countenance such a man by their presence. I have been advising some other persons to go to the Wesleyan chapel; as they would there hear plain honest men.”

The fifth count charged the defendant with having written and published, of and concerning the plaintiff, and of and concerning the said partnership transactions and accounts between the plaintiff and H. P., and of and concerning the said false and scandalous reports,—“It has all through been admitted, that Mr. H. (the plaintiff), in his dealings with his relatives, kept clear of the meshes of the law. The charges brought against him are not founded on strictly illegal acts, but on overreaching, &c., &c., his late partner.”

The sixth count charged the defendant with having, in answer to a letter addressed to him by R. A. (the plaintiff's friend), containing, among other things, the following passage,—“You have even said in T., that Mr. H. (the plaintiff) has cheated his relations out of 2000*l.*”—written and published, of and concerning the plaintiff, and of and concerning the said partnership, and of and concerning the said accounts and money transactions between the plaintiff and H. P., and of and concerning the words referred to in the letter

of R. A., as follows:—"I beg to tell you, that you do not understand the matters at all; that you have been grossly deceived; and that you are advocating a case the most disreputable that has come within my knowledge for many a day; and this you will freely admit, when the facts of it are fully comprehended: and this, my own opinion of the matter, is held in common with all the gentlemen and ministers who have heard both sides of the question,"—thereby meaning that the plaintiff had been and was guilty of improper and unbecoming conduct, and had behaved himself in a manner unworthy a preacher and minister as aforesaid.

The declaration then alleged for special damage, that the plaintiff had been injured in his calling as a minister and preacher, and brought into public scandal, &c., and that divers persons frequenting the said chapel at T., had withdrawn therefrom, and refused to permit the plaintiff to preach there, whereby the plaintiff had been prevented from obtaining profits, &c.

It appeared that the words charged in the first and second counts, were intended, and were understood, to convey an imputation that the plaintiff had taken advantage of his brother-in-law in the course of the partnership transactions and accounts, though by what precise means did not appear; and that the libels which were the subject of the fifth and sixth counts were written by the defendant in answer to a letter from the plaintiff's friend, R. A., who had been in correspondence with the defendant on the subject of the charges against the plaintiff, with the sanction and concurrence of the latter.

The only evidence of special damage, was that of a witness who stated that the plaintiff had told him he was to receive 30*l.* a year for preaching in T. chapel; but there was no evidence as to the way in which that sum was to be raised, or who were the parties to pay it; neither was there any evidence that any of the congregation had absented themselves from the chapel in consequence of the reports, or that the plaintiff had sustained any pecuniary damage therefrom:—

Held, that, in the absence of proof of special damage, the words charged in the first and second counts,—not being spoken of the plaintiff in reference to his office of minister,—were not the subject of an action; and that the letters declared on in the fifth and sixth counts were in the nature of confidential and privileged communications. *Hopwood v. Thorn.* 293

SOLICITOR.

See ATTORNEY.

TRUSTEE.

SPECIAL DAMAGE.

See SLANDER.

SPECIFICATION.

Construction of—See LETTERS PATENT.

STATUTE OF FRAUDS.

See SALE.

STOCK BROKER.

Proof of Foreign Law by—See EVIDENCE, III.

STOCK EXCHANGE.

Resolutions of—See RAILWAY SHARES.

STONE QUARRY.

See COVENANT.

TENANCY AT WILL.

See TRUSTEE.

TERM.

To attend Inheritance.

Surrender of.—A surrender of a term assigned to attend the inheritance, is not to be presumed, unless there has been a dealing with the estate in a way in which reasonable men would not have dealt with it unless the term had been put an end to. *Garrard, dem., Tuck, ten.* 231

TIMBER.

See COVENANT.

SALE.

TIME.

For Performance of Contract—See CONTRACT, II.

TIME TO PLEAD.

See PRACTICE, II.

TITHE-RENT-CHARGE.

See COSTS, V.

TRESPASS.

See COUNTY-COURT, V.

TROVER.

See SALE.

TRUSTEE.

Relation of Trustee and *Cestui que trust.*

1. The object of the statute 3 & 4 W. 4, c. 27, was, to settle the rights of persons adversely litigating with each other; not to deal with cases of trustee and *cestui que trust*, where there is but one single interest, viz. that of

the person beneficially entitled. *Garrard, dem., Tuck, ten.* 231

2. A *cestui que trust* who enters into possession of land, becomes, at law, tenant at will to the trustee: where, therefore, the equitable owner of an estate, a term in which has been assigned to attend the inheritance, is in possession, the right of entry under the 2d section of the 3 & 4 W. 4, c. 27, accrues only upon the determination of the tenancy at will resulting from such possession. *Id.*

3. The 3d section of the 3 & 4 W. 4, c. 27, does not apply to the case of a *cestui que trust* holding possession of land under the trustee. *Id.*

UNLIQUIDATED DAMAGES.

See BANKRUPT, II.

VENDOR AND PURCHASER.

Damages for Breach of Contract.

- A. entered into possession of premises under an agreement with B., under which he was to hold them as tenant for two years, at the yearly rent of 50*l.*, with liberty to him to make, at his own expense, such alterations and additions to the premises as he might think proper, the same being improvements, and A. to have the option of purchasing the premises, at any time during the two years, for 600*l.*—"it being understood between the parties that B. was possessed of the premises for his own life and the life of C., and of the survivor of them." It being, however, discovered that B. had not the precise interest mentioned in the agreement, A. brought assumpsit to recover damages for the breach of contract, and also compensation for the money expended by him in improvements:—Held, that he was only entitled to recover the value of the proposed lease, and not the value of the improvements. *Worthington v. Worthington.* 184

And see SALE.

WAIVER.

Of Irregularity—See PRACTICE, II.

WASTE.

See COVENANT.

WILL.

Will in two Parts, Effect of Alterations in One of them.

The testator executed a will in Yorkshire, in 1776, he then having four sons. A fifth son being born in 1777, the testator, in 1778, executed in London what was apparently in-

tended to be a copy of, and was dated on the same day as, the Yorkshire will, and at the same time made a codicil in duplicate,—the ostensible object of the codicil being, to make provision for the newly-born son. The testator's third son died in 1795. The testator died in 1808, leaving the other four sons him surviving. After his death, the Yorkshire will, with one copy of the codicil, were found in an open portfolio upon his library table, with erasures in both, the effect of which would be, in a certain event, to give to the eldest son certain estates which otherwise would have gone to the younger sons in succession. The London will, with the other copy of the codicil, were found, without alteration, locked up in a drawer in the same table. In the portfolio was also found an undated and unfinished sketch of a will. The Yorkshire will, and the codicil found with it, were proved by the testator's widow and executrix. After the death of all his brothers, the testator's fifth son brought an ejectment against the heir of his eldest brother, claiming under the limitations contained in the unaltered (or London) will and codicil. At the trial, the judge left it to the jury to say,—first, whether the London will was executed by the testator as a separate and independent will, or whether the Yorkshire will and the London will, with the duplicate codicil annexed to each, formed one will, the last will of the testator; telling them, that, if they were satisfied that all the documents together formed one will in two parts, an alteration or obliteration in one part, was, in point of law, an alteration or cancellation of the corresponding portion of the other part, and that the will, so altered, became the last will of the testator,—secondly, whether the alterations, when they were made by the testator, were intended by him to be final, and to stand as his last will, or were merely deliberative, and intended to exist only until he made a future will. The jury found that the two wills and the codicil were intended to form one will, and that the alterations in the Yorkshire will, and in the codicil found with it, were intended to be final:—Held, that these two questions were properly submitted to the jury, and that the direction of the judge was correct in point of law. *Doe d. Strickland v. Strickland.* 724

WITNESS.

See EVIDENCE.

WRIT OF ERROR.

Out of the Petty Bag Office, under the 12 & 13 Vict. c. 109.

Issued against Good Faith.—1. The court below refused to set aside a writ of error issuing

14 out of the petty-bag office pursuant to the 12 & 13 Vict. c. 109, on the ground that it had been issued against good faith, and in contravention of an agreement entered into between the parties,—thinking that the court in which the writ was returnable alone had power to deal with it. *Garrard, dem., Tuck, ten. 254*

2. The Court of Exchequer Chamber declined to set aside a writ of error issuing out of the petty bag office pursuant to the 12 & 13 Vict. c. 109, on the ground that it had been issued against good faith, and in contravention of an agreement entered into between the parties,

—holding that the power so to deal with the writ was in the court below, or in a judge at chambers under s. 37; the court of error not being a “superior court of common law,” within that statute. *Id. 258*

3. Held, that the Exchequer Chamber, irrespectively of the statute 12 & 13 Vict. c. 109, has no jurisdiction to quash a writ of error, —except for a defect apparent on the face of it, or on the ground that the record is inconsistent with it. *Id.*

4. A judge at chambers quashed such a writ. *Id. 270*

END OF THE EIGHTH VOLUME.

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